133-92

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~246~~ 479

THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MILLARD BOSWORTH AND CHARLES H. BOSWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 17, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 346.

THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MILLARD BOSWORTH AND CHARLES H. BOSWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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a *Transcript of Record.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

ILLINOIS CENTRAL RAILROAD COMPANY and THE CHICAGO, St. Louis and New Orleans Railroad Company, Plaintiffs in Error,
v.
MILLARD BOSWORTH and CHARLES H. BOSWORTH, Defendants in Error.
} No. 11178.

Thomas J. Semmes, Farrar & Simonds, for plaintiffs in error; White & Saunders, Farrar & Kruttschnitt, for defendants in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, 1886.

1 *Petition. Filed 8 December,* 1885.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY.
} No. 11178.

To the honorable the judges of the United States circuit court in and for the fifth circuit and eastern district of Louisiana:

The petition of Millard Bosworth and of Charles H. Bosworth, citizens and residents of the State of Louisiana, with due respect showeth—

That the father of your petitioners, Abel W. Bosworth, died on the 11th day of October, 1885.

That your petitioners are the only legitimate children of the said Bosworth who survived him, and that your petitioners have
2 accepted the succession of the said Bosworth under benefit of inventory.

That the said Abel W. Bosworth having taken part in the war of the Rebellion and having done acts which made him liable to the penalties prescribed in the act of Congress approved July 17th, 1862, known as the "confiscation act," the Government of the United States did, in accordance with the provisions of the said confiscation act, seize, condemn, and sell, in proceedings No. 7973 of the docket of the district court of the United States for the district of Louisiana, styled "United States *v.* The Batture Property of A. W. Bosworth," all the right, title, and interest of said A. W. Bosworth, con-

sisting of one undivided sixth part, in and to the following-described property, to wit:

"The batture in front of six lots of ground, numbered 1, 2, 3, 4, 5, and 6 on a plan made by Louis Pilié, city surveyor, on the 30th day of March, 1832, annexed to an act passed in the office of Louis T. Caire, late notary public, in this city, on the 26th
3 day of April, 1832, from D. F. Burthe to John Green, the said lots commencing at the corner of Gaiennie street and the then public road (now Front street) and measuring altogether on said road 127 feet 9 inches and 6 lines, and which batture opposite said lots commences at the corner of Gainnie and Front streets and extends along the river or east side of said Front street to Suzette street 127 feet 9 inches and 6 lines, and runs towards the river, between parallel lines, a distance of 300 feet, and has also 300 feet front on Gainnie street, together with all the rights, ways, servitudes, privileges, and advantages thereunto belonging or in anywise appertaining, and especially all the rights of batture or accretion now existing or which may hereafter be formed in front of said property, being the same property acquired by said Abel W. Bosworth by purchase from H. W. Palfrey and G. W. Denton, as per act before Edward Barnett, passed on the 25th day of April, 1860.

4 That at the sale made under the "*venditione exponas*" in *in* said cause No. 7973, in May, 1865, the said property was adjudicated by the United States marshal to E. W. Burbank.

That since said sale aforesaid to said Burbank in 1865 said batture in front of the six lots aforesaid has largely increased by natural accretion, has been laid off in squares by the city of New Orleans, and has become capable of private ownership.

That the said batture now consists—

1st. Of a part of the square bounded by Front, Gainnie, Erato, and Water streets, and measures 127 feet 9 inches and six lines front on Front street, 300 feet on Gainnie street, and 127 feet 9 inches and six lines on Water street.

2nd. A part of the square bounded by Gainnie, Water, Erato, and Pilie streets, measuring 127 feet 9 inches and six lines on
5 Water street, 150 feet on Gaiennie street, and 127 feet 9 inches and six lines on Pilie street.

3rd. A part of the square bounded by Gaiennie, Pilie, Erato, and New streets, measuring 127 feet 9 inches and six lines on Pilie street, the same on New street, and 150 feet on Gaiennie street.

4th. All that portion of ground which lies between New street, Gaiennie street, and the Mississippi river, and a line drawn from the centre of New street perpendicular to the Mississippi river, commencing at a point 127 feet 9 inches and six lines from the corner of Gaiennie and New streets.

5th. Of all the future accretions which may hereafter form in front of the said last-mentioned portion of ground.

That under and by virtue of the said act of July 17th, 1862, known as the confiscation act, and under and by virtue of the joint resolution of the Congress of the United States passed simultaneously

6 therewith, your petitioners did, upon the death of their said father, become the owners in fee simple of the one undivided sixth of all the above-described property, with the buildings and improvements thereupon situated and thereto pertaining, and became entitled to all the rents, revenues, issues, and profits accruing from the said property from the said 11th day of October, 1885.

And your petitioners aver that the property above described is now in the possession of the Illinois Central Railroad Company, a corporation organized under the laws of the State of Illinois and as such a citizen of said State.

That the said corporation is here present in this State and in this district doing business, and that the said corporation is found in this district under the statutes of the United States and the laws of the State of Louisiana in such cases made and provided.

7 That the said corporation, though amicably requested, refuses to deliver possession of the said property above described to your petitioners and refuses to pay to your petitioners the rents and profits of the said property which have accrued in their hands from the 11th day of October, 1885, down to this time.

Your petitioners aver that their undivided sixth interest in the above-described property and the improvements thereof is well worth the sum of seventy-five ($75,000) thousand dollars, and that the rents and revenues, profits and issues, accruing from the said undivided one-sixth interest in the hands of the said Illinois Central Railroad Company (the unlawful possessor thereof) are well worth the sum of $500 per month.

Wherefore, the premises considered, your petitioners pray that the Illinois Central Railroad Company may be cited, through its proper officer, to answer this demand, and that, after due pro-
8 ceedings had, there may be judgment in favor of your petitioners and against said railroad company ejecting them from the property above described and placing your petitioners in the possession thereof.

And that your petitioners may have further judgment against said Illinois Central R. R. Company as damages for their unlawful detention of said property at the rate of five hundred ($500) dollars per month from the 11th day of October, 1885, down to the date when final delivery of the said property shall be made by said company to your petitioners.

And your petitioners pray for all such further and general relief as the nature of the case may require.

(Signed) FARRAR & KRUTTSCHNITT,
Attorneys.

(Signed) WHITE & SAUNDERS.

Citation to Illinois Central Railroad Company, Defendant. Issued 8th December, 1885.

9 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD CO. } No. 11178.

The President of the United States of America to The Illinois Central Railroad Company, a corporation organized under the laws of the State of Illinois and a citizen of said State, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

10 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 8 day of December, A. D. one thousand eight hundred and eighty-five, and of the Independence of the United States of America the 110th year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return. Filed 9th Dec'r, 1885.

Received Dec. 8, 1885, and on the 9 day of Dec., 1885, I served a true copy of the within citation and accompanying plaintiffs' petition, at the office of the Illinois Central R. R. Co., by handing the same to S. B. McConnico, Esq., who informed me that he was the general agent of the said company in the city of New Orleans; that there is no president of said defendant company in this district, and that he is the duly authorized person on whom service can be

11 made in the eastern district of Louisiana, and service was so made at the office of said defendant company, at the cotton exchange building, in the city of New Orleans.

(Signed) R. B. PLEASANTS,
U. S. Marshal, E. D. of La.
JNO. BAKER,
Dep'ty U. S. Marshal, E. D. of La.

Disclaimer. Filed 22 December, 1885.

U. S. Circuit Court, E. Dist. of La.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL R. R. COMPANY. } No. 11178.

To the honorable the judges of the circuit court of the United States, sitting in and for the fifth circuit and eastern district of Louisiana:

Now comes The Illinois Central Railroad Company, made defendant in the above styled and numbered cause, and disclaims ownership of the property sued for and described in the petition of plaintiffs, and says that it is in the actual possession of said property only as the farmer or lessee thereof by virtue of a lease executed on
12 the 13th day of June, 1882, by the owner thereof, whom this defendant declares to be the Chicago, St. Louis and New Orleans Railroad Company, a corporation organized under the laws of the State of Louisiana and domiciled in the city of New Orleans, and that said lease is still in full force and effect and unexpired.

Wherefore this defendant prays to be hence dismissed.

(Signed) THOS. J. SEMMES, *Of Counsel.*
(Signed) FARRAR & SIMONDS, *Attorneys.*

Continuance.

Extract from the Minutes, November Term, 1886.

NEW ORLEANS, TUESDAY, *January* 12, 1886.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL R. R. CO. } 11178.

By consent of counsel for both parties it is ordered that this cause be continued until the 2d day of February, 1886, at 11 a. m.

13 *Answer of The Illinois Central Railroad Company and Call in Warranty. Filed 2nd February*, 1886.

U. S. Circuit Court, Eastern District of Louisiana.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } No. 11178.

The answer of The Illinois Central Railroad Company, defendant in the above styled and numbered cause.

To the honorable the judges of the circuit court of the United States, sitting in and for the fifth circuit and eastern district of Louisiana:

Now comes into this honorable court The Illinois Central Railroad

Company, made defendant in the above styled and numbered cause, and, for answer to the petition and demand of the plaintiffs and for the purpose of defending and maintaining the right and title of this defendant in and to the possession and enjoyment of the hereinafter-mentioned real estate, with all of the batture, accre-
14 tions, and other rights, ways, servitudes, and appurtenances, together with all of the buildings, structures, and improvements thereon situate or thereunto pertaining, sayeth—

That, save and except such as may hereinafter be admitted to be true, this defendant denies all and singular the averments and allegations contained or set forth in the petition of the plaintiffs.

Further answering, this defendant says that it is now and has been since the first day of July, A. D. 1882, in the actual, continuous, exclusive, and rightful possession and enjoyment, as a necessary part of its freight depot grounds and for terminal facilities, uses, and purposes in its business of common carrier of freight by railroad into and out from the city of New Orleans, and as a necessary and essential part of such terminal facilities for the construction thereon of its freight depots, freight sheds, platforms, railroad
15 tracks, and other structures, buildings, and improvements necessary to the handling and distributing of freight and the maintenance and operation of this defendant's railroad in the city of New Orleans, of all of that certain portion of real estate situate in the first district of the city of New Orleans and bounded by Front street, Gaiennie street, Erato street, and the Mississippi river, together with all of the batture, accretions, and other rights, ways, servitudes and appurtenances thereunto belonging, and all of the freight depots, freight sheds, platforms, railroad tracks, and other structures, buildings, and improvements thereon situate, of which said portion of real estate the plaintiffs claim the ownership of, in, and to a certain undivided one-sixth part or interest, described in the petition of the plaintiffs.

Defendant further says that it is the farmer or lessee of said real estate among others, and, as such farmer or lessee, that it is entitled to have and to hold, to possess, use, occupy, and enjoy, the
16 said real estate, with all of the batture accretions and all of the other rights, ways, servitudes, and appurtenance thereunto belonging, and all of the said buildings, structures, and improvements thereon situate, including the said undivided one-sixth interest or part thereof sued for by the plaintiffs and described in the petition, for and during the full term of four hundred years next ensuing from the said first day of July, 1882, under and by virtue of a certain valid lease or indenture executed and delivered unto this defendant on the thirteenth day of June, 1882, by the Chicago, St. Louis and New Orleans Railroad Company, a corporation duly organized under the laws of the State of Louisiana and a citizen thereof, and that said lease was and is still duly recorded in the parish of Orleans, in the office of the register of conveyances, in Book 119, folio 213, and in the office of the recorder of mortgages for said
17 parish, in Book 227, folio 646, and is still in full force and effect.

Defendant further says that its said lessor, the said Chicago,

St. Louis and New Orleans Railroad Company, was, at the time of the execution and delivery of said lease unto this defendant as aforesaid and had been for many years prior thereto, the true and lawful owner in fee simple, absolute, and in full ownership, and as such in full and undisputed possession and enjoyment of said described real estate, with all of the said batture rights of accretion and all of the said rights, ways, servitudes, and appurtenances thereunto belonging, including the said undivided one-sixth interest or part thereof now sued for by the plaintiffs and described in the petition, and that, so owning and claiming to own the whole of said hereinabove-described real estate, with all of the batture rights of accretion and all of the said other rights, ways, servitudes, and appurtenances thereunto pertaining in fee simple, absolute, and in full ownership, the
18 said Chicago, St. Louis and New Orleans Railroad Company, on said thirteenth day of June, 1882, in consideration of the rents and covenants in the said lease contained, did grant, demise, and to farm let, among others, the whole and entirety of the said above-described real estate, with all of said rights and appurtenances thereunto belonging, including the said undivided one-sixth interest or part thereof described in the petition of the plaintiffs, unto this defendant; to have and to hold, to possess, use, occupy, and enjoy, the said demised premises for the said purposes, ends, and uses of terminal facilities in its railroad business in the city of New Orleans for and during the full term of four hundred years next ensuing from the first day of July, A. D. 1882.

Further answering, this defendant says that, believing itself to be in the rightful and lawful possession of the whole or entirety of the said above-described real estate, including the said undivided
19 one-sixth interest or part thereof described in the petition of the plaintiffs, with all of the said batture rights and said other rights, ways, servitudes, and appurtenances thereunto in anywise pertaining, together with all of the said structures, buildings, and improvements thereon situate, and entitled to have and to hold, to possess, occupy, use, and enjoy, the same for and during the full term of four hundred years from the said first day of July, 1882; this defendant, acting in good faith and without any notice, actual or constructive, of any adverse claim on the part of these plaintiffs or any other person of, in, or to the said demised premises or any part thereof, has placed thereon since said first day of July, 1882, many valuable improvements and structures, consisting of freight sheds, platforms, railroad tracks, switches, and other structures and improvements necessary to the maintenance and operation of this defendant's railroad in its business of common carrier of
20 freight into and from the city of New Orleans and necessary and well adapted to the terminal facilities of this defendant's railroad on and along the river front in the city of New Orleans; that a large part and portion of said sheds, platforms, railroad tracks, and other structures and improvements are located upon the said property described in the petition, and were placed there by this defendant in good faith and without notice as aforesaid, and that the value and cost of such improvements and structures situated

upon the said undivided one-sixth portion of the said real estate described in the petition and placed thereon by this defendant in good faith and without notice, actual or constructive, as aforesaid is the full sum of two thousand five hundred dollars.

And now this defendant, assuming the position of plaintiff in reconvention, claims and demands of the plaintiffs in the above styled and numbered cause the full sum of two thousand five hun-
21 dred dollars, with interest thereon according to law, for the value and cost of the said buildings, structures, and improvements placed by this defendant upon the said property described in the petition, in good faith and without notice as aforesaid, in the event that this defendant should be evicted from said property and in the event that said plaintiffs should be adjudged to be the owners of the same by judgment of this honorable court.

And, further answering, this defendant says that its said lessor, the said Chicago, St. Louis and New Orleans Railroad Company, as this defendant is informed and believes, acquired the whole or entirety of the said above-described portion of real estate and appurtenances and became the owner thereof in fee simple, absolute, and full ownership through and by means of the consolidation into one board and body corporate of the New Orleans, Jackson and Northern Railroad Company, a corporation organized under
22 the laws of the State of Louisiana, with the Central Mississippi Railroad Company, a corporation organized under the laws of the State of Mississippi, which said consolidation was duly effected and entered into on the 7th day of November, 1877, and a copy of the said agreement or articles of consolidation was duly recorded in the office of the secretary of state of the State of Louisiana on the eight day of November, 1877, and that said consolidation was duly ratified and confirmed by act of the General Assembly of the State of Louisiana approved March 13th, 1878, and said consolidated company was thereby created a corporation of the State of Louisiana, under the name and style of said Chicago, St. Louis and New Orleans Railroad Company.

Defendant further says that said New Orleans, Jackson and Northern Railroad Company acquired the above-described real estate and appurtenances, including the said one-sixth part thereof sued for by plaintiffs, among others, by purchase from certain
23 individuals, to wit, Adolphe Schreiber, Constantine Menclas, William H. Osborn, Lewis E. Simonds, and Benjamin F. Ayer, styling themselves a committee of purchasers, by act executed before Andrew Hero, Jr., notary public in and for the parish of Orleans, on the 16th day of May, 1877, and duly recorded in Conveyance Book —, folio —, in the office of the register of conveyances for the parish of Orleans on the — day of May, 1877.

Defendant further says that the said individuals styled a committee of purchasers acquired the said described property and appurtenances, including the said undivided one-sixth interest or part thereof sued for by the plaintiffs, by purchase at a public sale thereof made in New Orleans on the 17th day of March, 1877, under and by virtue of a certain decree and order of sale rendered by the hon-

orable the circuit court of the United States for the fifth circuit and district of Louisiana in the cause or proceeding styled "J. B.
24 Alexander *et al. v.* New Orleans, Jackson & Great Northern Railroad Company *et al.*" No. 7789 of the docket of said court, it being a regular foreclosure sale of a certain mortgage or deed of trust executed by the New Orleans, Jackson and Great Northern Railroad Company on May 1st, 1872; which said deed of trust embraced and covered the hereinabove-described real estate, including the said undivided one-sixth part thereof described in the petition of the plaintiffs, and was duly recorded in office of the recorder of mortgages for the parish of Orleans in Book —, folios —, on the — day of May, 1872.

That during the pendency of said foreclosure cause or proceeding the court appointed one J. B. Alexander receiver in February, 1876, who was ordered by the court to take into his possession all of the property, real and personal, covered by the said mortgage or deed of trust and to make and file in said cause a full, com-
25 plete, and accurate schedule or inventory of all of the property embraced or covered by the said mortgage; that said receiver did make and file such inventory and did take possession of all of the said property, including the said undivided one-sixth interest in and to the said property claimed by the plaintiffs in this cause.

That a due notice of said sale was by order of said court published in the "Daily Picayune," a newspaper published daily in the city of New Orleans, from the 17th day of January, 1877, down to and including the 17th day of March, 1877, aforesaid; that said notice referred to said schedule or inventory, which was open for inspection in the clerk's office of said court, and named the day and time of the day and place in the city of New Orleans for said sale of all of the property of the said New Orleans, Jackson and Great Northern Railroad Company, among which was included the said undivided
26 one-sixth interest or part of the said portion of real estate described in the petition of the plaintiffs; that said sale was publicly made in front of the United States custom-house in New Orleans, and that said committee of purchasers complied with said sale and paid the purchase-money, to wit, many thousands of dollars, into the hands — the officer making said sale, and that said purchase-money was duly paid into the registry of said court, and has long since and before this suit commenced or any notice whatever of the adverse pretended claim of the plaintiffs been paid out and distributed in accordance with the orders of said court.

That a deed of all of said property, including the said undivided one-sixth interest or portion described in the petition of plaintiffs, sold to said purchasers at said sale was ordered to be made
27 and executed by said court, conveying to the said purchasers a full, valid, and indefeasible title to the said property and premises, and that such deed was duly made and executed by the trustees under said mortgage or deed of trust, the mortgagor, the said New Orleans, Jackson and Great Northern Railroad Company, the special master in chancery, and other proper parties thereto; which

said deed was duly ratified and approved by said court and delivered to the said committee of purchasers on the 23rd day of March, 1877, and was duly recorded in the office of the register of conveyances for the parish of Orleans, in Book 111, folio 30, on the 17th day of April, 1877.

Defendant further says that the said New Orleans, Jackson, and Great Northern Railroad Company acquired the said described real estate and appurtenances, including the said undivided one-sixth interest therein described in plaintiffs' petition, among others,
28 by purchase from Samuel H. Edgar, a citizen of the State of Delaware, by act executed before Charles Nettleton, a duly authorized commissioner for the State of Louisiana, resident in the city of New York, on the 10th day of October, 1872, and duly recorded in the office of the register of conveyances for the parish of Orleans on the 30th day of October, 1872, in Book 102, folios 553, 554, 555, and 556.

Defendant further says that said Samuel H. Edgar acquired the one-third undivided interest, share, and part of, in, and to the said above-described portion of real estate, including the said undivided one-sixth interest or part described and set forth in the petition of the plaintiffs and all that the plaintiffs claim in this suit, with all of the improvements on the said described real estate, and all rights, ways, privileges, servitudes, customs, and appurtenances thereunto belonging or in anywise appertaining, and especially all
29 rights of accretion and batture formed or to be formed thereto by the Mississippi river, by purchase from Abel Ware Bosworth, the ancestor of the plaintiffs, and Mrs. Rachel Matilda Weir, his wife, by act executed before Andrew Hero, Jr., notary public in and for the city of New Orleans, on the 23rd day of September, 1871, and duly recorded in the office of the register of conveyances for the parish of Orleans, in Conveyance Book 100, folio 247, on the 30th day of September, 1871.

That said A. W. Bosworth and wife, in a covenant of warranty in the said act of sale and deed contained, did bind themselves and their heirs to forever warrant and defend the right and title of the said purchaser, his heirs, representatives, and assigns, in and to the said premises conveyed against all legal claims and demands whatever arising out of their own acts and deeds or the acts and deeds of any person or persons claiming under them, and that said A. W. Bosworth was not at that time under any disability or
30 penalty whatsoever as to the interest or estate in the said property now claimed by the plaintiffs.

Defendant further says that the said covenant of warranty in the said act and deed of said A. W. Bosworth and wife contained is binding upon his heirs, the plaintiffs in this cause, and that said plaintiffs are thereby and by virtue thereof forever estopped and debarred from claiming any right, title, interest, or estate whatever in or to the said property and appurtenances or any part thereof by inheritance from their said father, A. W. Bosworth.

Defendant further says that at the time of the execution of said deed and conveyance by said A. W. Bosworth and wife to said Sam-

uel H. Edgar on said 23rd day of September, 1871, said Bosworth was and had been for many years prior thereto a true and loyal citizen of the United States, in full possession of all of his rights,
31 powers, privileges, and dignities of citizenship, and fully capable of binding his heirs by any act or deed whatsoever for valuable consideration as to any right, title, interest, or estate which the said heirs might acquire by inheritance through him.

That said A. W. Bosworth had long prior to that time taken and subscribed the oath of allegiance to the United States, and had been and was included in the general amnesty proclamation of the President of the United States issued on the 25th day of December, 1868, and that said Bosworth had also been granted a full and complete special pardon by the President of the United States on the second day of October, 1865, under and by virtue of a certain warrant of pardon of said date, and that said Bosworth had duly accepted the said special pardon and had complied with and fulfilled all of the terms and conditions thereof and thereby, and by virtue of
32 said general amnesty said Bosworth became and was restored to and reinvested with all of his rights, franchises, privileges, and dignities of citizenship as fully and completely as if no offense had ever been committed by him against the lawful authorities of the United States and as fully and completely as if no disability had ever been placed upon him and no forfeiture of his property during his life had ever been had in virtue of the act of Congress in such case made and provided or in virtue of the said alleged judgment of confiscation referred to in the petition of the plaintiffs.

And, further answering, this defendant says that as to the said pretended proceedings had in the cause styled "United States *v.* A Certain Portion of Batture, the Property of Abel Ware Bosworth," No. 7973 of the docket of the district court of the United States for the eastern district of Louisiana, and the said alleged judg-
33 ment of condemnation and forfeiture thereunder, the same were and are null and void and of no effect or validity.

And this defendant further says that at all events the said judgment of confiscation had lost its force and effect by the pardon and amnesty aforesaid prior to the death of said Bosworth and prior to the sale made by him on said 23rd day of September, 1871, as aforesaid, to said Edgar, so far as said judgment of confiscation had not been carried into execution by the sale thereunder to said E. W. Burbank, as set forth in the petition, and that said pardon and amnesty removed the disability of said Bosworth to alienate or dispose of the confiscated property, the absolute title to which had not been vested either in said Burbank, the purchaser under said judgment, or in the plaintiffs, who were not then the heirs of said A. W. Bosworth.

Wherefore, the premises considered, this defendant prays
34 that its said lessor, the said Chicago, St. Louis and New Orleans Railroad Company, through its proper officer, be called in warranty and be cited to answer the call of this defendant in warranty and be required to answer the petition of the plaintiffs and to warrant and defend the right, title, and possession of this de-

fendant in and to the said property sued for by the plaintiffs and described in the petition; and, in the event that the plaintiffs have judgment against this defendant, defendant prays that it do have and recover such judgment against its said lessor, the said Chicago, St. Louis and New Orleans Railroad Company, as may be rendered against this defendant.

And, assuming the position of plaintiff in reconvention, this defendant prays that, in the event this defendant be evicted from the said property and premises described in the petition of plaintiffs by judgment rendered in favor of the plaintiffs, this defendant
35 may have and recover judgment in the sum of two thousand five hundred dollars, with legal interest thereon, against said plaintiffs for the value of the improvements placed by this defendant in good faith and without notice, actual or constructive, as hereinabove shewn, upon the property sued for by the plaintiffs.

Defendant prays for such other and further and general relief as the nature of this cause may require, and for costs in this behalf most wrongfully sustained.

(Signed) T. J. SEMMES & LEGENDRE,
(Signed) FARRAR & SIMONDS, *Att'ys.*

Cause Fixed for Trial.

Extract from the Minutes, November Term, 1885.

NEW ORLEANS, TUESDAY, *February* 2, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD CO. } 11178.

36 On motion of counsel for the respective parties, it is ordered that this cause, heretofore continued until to-day, be reassigned for hearing on Wednesday, March 3rd, 1886, at 11 a. m.

Citation to The Chicago, St. Louis and New Orleans Railroad Company, Called in Warranty. Issued 4 February, 1886.

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD CO. } No. 11178.

The President of the United States of America to The Chicago, St. Louis and New Orleans Railroad Company, a corporation duly organized under the laws of the State of Louisiana and a citizen thereof, through its proper officer, Greeting:

You are hereby summoned to comply with the demand contained

in the answer and call in warranty, of which a copy accom-
37 panies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 4 day of February, A. D. one thousand eight hundred and eighty-six, and of the Independence of the United States of America the 110th year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return. Filed 6th February, 1886.

Received Feb. 4, 1886, by the U. S. marshal, and on the 4th day of Feb., 1886, I served a true copy of the within citation and accompanying copy of answer and call in warranty on The Chicago, St. Louis and New Orleans Railroad Company by handing the
38 same to Mr. R. S. Charles, Esq., who informed me he is the treasurer of the said company, in the cotton exchange building, in the city of New Orleans, La.

(Signed) R. B. PLEASANTS,
U. S. Marshal, E. D. of La.
JNO. BAKER,
Dep'ty U. S. Marshal.

Exception and Answer of Chicago, St. Louis and New Orleans Railroad Company. Filed February 12, 1886.

U. S. Circuit Court, Eastern District of Louisiana.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY *et al.* } No. 11178.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

Now comes into this honorable court The Chicago, St. Louis and New Orleans Railroad Company, made defendant and called in warranty in the above styled and numbered cause, and excepts to the petition of the plaintiffs in said cause, and for cause of exception says that the petition of the plaintiffs discloses a want of ca-
39 pacity on the part of said plaintiffs to institute and maintain this suit; that it is averred in said petition and it appears upon the face thereof that said plaintiffs have accepted the succession of Abel Ware Bosworth under benefit of inventory; that thereby plaintiffs, as beneficiary hiers, are without any authority or capacity to represent the succession of Abel Ware Bosworth.

Wherefore this defendant and exceptor prays that this exception be maintained, and that plaintiffs' suit be dismissed with costs; and in the event that the above and foregoing exception be overruled, then this defendant and exceptor further excepts to said petition of plaintiffs, and for further cause and ground of exception says that said petition does not disclose any cause of action.

Wherefore defendant and exceptor prays that this exception be maintained, and this suit be dismissed at plaintiffs' cost; and
40 in the event that both the above and foregoing exceptions be overruled, then this defendant answers to the petition and demand of the plaintiffs and says:

Now comes The Chicago, St. Louis and New Orleans Railroad Company, made defendant and called in warranty in the above styled and numbered cause, and for answer to the petition and demand of the plaintiffs says that this defendant adopts as its answer the answer hereinbefore filed by its lessee and codefendant, The Illinois Central Railroad Company, and for further answer and plea this defendant pleads the prescription of ten years under a just title and continuous possession in good faith in support of its right and title in and to the property sued for by the plaintiffs.

Wherefore this defendant prays that plaintiffs' demand may be rejected with costs, and for all general relief.

(Signed) FARRAR & SIMONDS, *Attorneys.*

Continuance.

Extract from the Minutes, November Term, 1885.

NEW ORLEANS, WEDNESDAY, *March* 3, 1886.

41 Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HEIRS OF BOSWORTH
v. } 11178.
ILLINOIS CENTRAL RAILROAD CO.

Ordered, That this cause, set down for hearing to-day, be continued, to be hereafter set down on motion of counsel.

Cause Fixed for Trial.

Extract from the Minutes.

NEW ORLEANS, WEDNESDAY, *March* 24, 1886.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HEIRS OF BOSWORTH
v. } 11178.
ILLINOIS CENTRAL RAILROAD CO.

On motion of Farrar & Kruttschnitt, of counsel for plaintiffs, it is ordered that this cause be set down for hearing for Friday, April 2,

1886, at 10 a. m., and that the defendants, through their counsel, Messrs. Farrar & Simonds, be notified thereof.

42 *Statement of Facts. Filed 2d April,* 1886.

U. S. Circuit Court, Eastern District of Louisiana.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY *et al.* } No. 11178.

Statement of facts agreed upon between plaintiffs and defendants.

The following is agreed by and between the plaintiffs and the defendants in this cause to be the statement of facts upon which the case is to be submitted to the court for decision without the intervention of a jury, both plaintiffs and defendants hereby specially waiving trial by jury:

1st. The plaintiffs, Millard Bosworth and Charles H. Bosworth, are the only surviving le*ti*gitimate children of Abel Ware Bosworth, who died intestate in the city of New Orleans on the eleventh day of October, 1885, and have accepted his succession with benefit of inventory.

2nd. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and others a one-third undivided interest in fee simple title and full ownership in and to the property described in the petition of the plaintiffs in this cause.

43 3rd. On the breaking out of the war between the States Abel W. Bosworth entered the Confederate army and bore arms against the Government of the United States from about March, 1861, until April, 1865.

4th. Under and by virtue of the confiscation act of the United States, approved July 17th, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day of January, 1865, a libel of information was filed against the said property as the property of A. W. Bosworth in the district court of the United States for the eastern district of Louisiana.

Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and, after due proceedings had, the said court entered a decree of condemnation as to A. W. Bosworth and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one-half of said one-third undivided interest in and to said property.

44 A *venditione exponas* in due form of law issued to the marshal for the sale of said property under said decree, and at said sale "all the right, title, and interest of A. W. Bosworth in and to the one undivided third part of said property" (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the court) was adjudicated on the — day of the month of May, 1865, to E. W. Bur-

bank for the price and sum of $1,700.00, and the marshal executed a deed in due form of law to said Burbank for the same.

5th. Subsequently thereto, in March, 1869, the said A. W. Bosworth filed a libel of review in said district court in said cause, making said E. W. Burbank, the purchaser of said property, a party thereto, which said libel of review was dismissed; that subsequently thereto, in the month of February, 1870, the said A. W. Bosworth took a writ of error to the circuit court of the United States from the judgment of condemnation aforesaid, which said judgment of
45 condemnation was affirmed in the said circuit court upon the writ of error aforesaid.

6th. That on the second day of October, 1865, Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked "Document 'A.'"

7th. That on the 23rd day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned, and transferred to Samuel H. Edgar, with full warranty under the laws of Louisiana, all their right, title, and interest in and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and described in the petition, for the price and sum of
46 eleven thousand six hundred and sixty-six .66⅔ dollars.

8th. That on the 18th day of December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title, and interests in the nature of a quitclaim to S. H. Edgar aforesaid for the price and sum of five thousand one hundred dollars.

9th. That the said S. H. Edgar, by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana in New York city, on the 10th day of October, 1872, and duly recorded in the office of the register of conveyances for the parish of Orleans on the 30th day of October, 1872, sold and transferred the same property, with full warranty under the laws of Louisiana, unto the New Orleans, Jackson and Great Northern Railroad Company.

10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis and New Orleans Rail-
47 road Company, who has leased the same to the Illinois Central Railroad Company, which said company holds said property under said lease.

11th. That said property sued for in this case and described in the petition is variously estimated in value, the plaintiffs contending that it is worth at least the sum of $25,000.00 and the defendants contending that it is not worth more than the sum of $10,000.00. No evidence is to be adduced as to the value of rents and revenues of this property, it being agreed that the claim of the parties plaintiff in case they succeed shall be dismissed as a nonsuit.

12th. That in the interval between January, 1873, and the death of said Bosworth said defendants, The Chicago, St. Louis and New Orleans Railroad Company and the Illinois Central Railroad Com-

pany, lessee, have placed and constructed various betterments
48 and improvements on said property, which are attached to the soil, such as platforms, freight sheds, freight depots, railroad tracks, switches, etc., which the plaintiffs claim enure to their benefit and which the defendants deny.

13th. That the proportion of the improvements and betterments aforesaid placed by the Illinois Central Railroad Company upon the property described in the petition from July 20th, 1882, down to the death of said A. W. Bosworth amounts to the sum of two thousand five hundred dollars.

(Signed) FARRAR & KRUTTSCHNITT,
Attorneys Plaintiffs.

(Signed) FARRAR & SIMONDS,
Attorneys for Defendants, Illinois Central R. R. Co. and Chicago, St. Louis and New Orleans R. R. Co.

14th. It is further agreed as a part of this statement of facts that the President of the United States on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms
49 of said proclamation as found in the Statutes at Large of the United States are made part of this statement of facts.

(Signed) FARRAR & KRUTTSCHNITT,
Att'ys Pl'ffs.

(Signed) FARRAR & SIMONDS,
Att'ys for Def'd'ts.

DOCUMENT "A." Warrant of pardon. Exhibit filed by defendants 2d April, 1886, and referred to in foregoing statement of facts.

No. 1109.

UNITED STATES OF AMERICA, *Department of State:*

To all whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the records and files of this Department.

In testimony whereof I, Thomas F. Bayard, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 10th day of February,
50 A. D. 1886, and of the Independence of the United States of America the one hundred and tenth.

[SEAL.] (Signed) T. F. BAYARD.

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, Greeting:

Whereas A. W. Bosworth, of New Orleans, Louisiana, by taking part in the late rebellion against the Government of the United States, has made himself liable to heavy pains and penalties;

And whereas the circumstances of his case render him a proper object of executive clemency:

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said A. W. Bosworth a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

1st. This pardon to be of no effect until the said A. W.
51 Bosworth shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

2d. To be void and of no effect if the said A. W. Bosworth shall hereafter at any time acquire any property whatever in slaves or make use of slave labor.

3d. That the said A. W. Bosworth first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

5th. That the said A. W. Bosworth shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this second day of October, A. D. 1865, and of the Independence of the United States the ninetieth.

ANDREW JOHNSON.

52 By the President:

WILLIAM H. SEWARD,
[SEAL.] *Secretary of State.*

WASHINGTON, D. C., *October 5th*, 1865.

Honorable William H. Seward, Secretary of State.

SIR: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date October 2d, 1865, and hereby signify my acceptance of the same with all the conditions therein specified.

I am, sir, your obedient servant,

A. W. BOSWORTH.

Cause Submitted.

Extract from the Minutes, November Term, 1885.

NEW ORLEANS, FRIDAY, *April* 2, 1886.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.
" Hon. Edward C. Billings, district judge.

53 HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } 11178.

This cause came on to be heard before the circuit and district judges, whereupon the parties in interest filed a stipulation waiving the intervention of a jury, and the trial was proceeded with; and, after hearing pleadings and evidence and the arguments of counsel for the parties, respectively, the cause was submitted, when the court took time to consider.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1885.

NEW ORLEANS, WEDNESDAY, *April* 7, 1886.

Court met pursuant to adjournment.
54 Present: Hon. Don A. Pardee, circuit judge.
" Hon. Edward C. Billings, district judge.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD CO. } 11178.

The parties in this cause having filed a stipulation waiving the intervention of a jury and having submitted the cause to the court upon an agreed statement of facts in the nature of a special verdict, and the court having considered the said agreed statement of facts and being advised in the premises, finds the issues of law raised by the pleadings in favor of the plaintiffs.

It is therefore ordered, adjudged, and decreed that the
55 pleas and exceptions of the defendants be overruled, and that there be judgment in favor of the plaintiffs and against the defendants declaring the plaintiffs the owners of and entitled to the possession of the undivided one-sixth interest in and to the following-described property situated in the city of New Orleans, with all the buildings and improvements thereon, to wit:

1st. Part of the square bounded by Front, Gaiennie, Erato, and Water streets, and measures 127 feet 9 inches and six lines front on Front street, 300 feet on Gaiennie street, and 127 feet 9 inches and 6 lines front on Water street.

2nd. Part of the square bounded by Gaiennie, Water, Erato, and

Pilié streets, measuring 127 feet 9 inches and six lines on each, Water and Pilié, street by about 150 feet on Gaiennie street.

3rd. Part of the square bounded by Gaiennie, Pilié, Erato, and New streets, measuring 127 feet 9 inches and six lines on
56 Pilié, the same on New street, and about 150 feet on Gaiennie street.

4th. All that portion of ground which lies between New street, Gaiennie street, and the Mississippi river and a line drawn from the centre of New street perpendicular to the Mississippi river, commencing at a point 127 feet 9 inches and six lines from the corner of Gaiennie and New street-.

5th. All the future accretions which may hereafter form in front of the said last-mentioned portion of ground.

And it is further ordered, adjudged, and decreed that there be judgment ejecting the defendants from the above-described one-sixth undivided interest in the said property.

And it is further ordered, adjudged, and decreed that the reconventional demand of the defendant, The Illinois Central Railroad Company, be rejected with costs.

And it is further ordered that the plaintiffs do have and
57 recover judgment for their costs herein against the defendants.

And it is further ordered, adjudged, and decreed that the demand of the plaintiffs for damages for the detention of said property be dismissed as in case of nonsuit.

Judgment rendered April 7, 1886.

Judgment signed April 12, 1886.

(Signed) EDWARD C. BILLINGS, *Judge.*

Order Correcting Clerical Error in Judgment.

Extract from the Minutes, November Term, 1885.

NEW ORLEANS, THURSDAY, *April* 15, 1886.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

HEIRS OF BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } 11178.

By consent of counsel for parties in interest the minutes and the judgment herein entered on the 7th instant shall be corrected to read as follows: "5th. All the future accretions which may hereafter form in front of the said last-mentioned portion of ground," the word "front" being substituted for "part," as originally entered.

58 *Assignment of Errors. Filed 15th April, 1886.*

THE ILLINOIS CENTRAL RAILROAD COMPANY and THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, Plaintiffs in Error,
v.
MILLARD BOSWORTH and CHARLES H. BOSWORTH, Defendants in Error. } 11178.

Now come the plaintiffs in error aforesaid, by their undersigned counsel, and make the following assignment of errors:

First. The circuit court erred in overruling the exception of The Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error, to the capacity of the defendants in error to sue.

Second. The circuit court erred in overruling the exception of no cause of action filed by the said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Third. The circuit court erred in overruling the plea of
59 prescription filed by said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Fourth. The circuit court erred in rejecting the reconventional demand of The Illinois Central Railroad Company, one of the plaintiffs in error, for the value of improvements placed on the lots of ground described in the petition.

Fifth. The circuit court erred in holding that the special pardon of A. W. Bosworth, set up in the pleadings, and the general amnesty proclamation of December 25th, 1868, had not the effect of restoring to said A. W. Bosworth the power of selling and disposing of the lots of ground in question after the termination of the life estate conveyed at the confiscation sale, and of blotting out the offense committed by him and thereby enabling him to exercise all his rights as to said property, except in so far as the same had been conveyed to Burbank, the purchaser at said confiscation sale,
60 and investing him with power to bind his heirs by any warranty in reference thereto.

(Signed) THOS. J. SEMMES,
GIRAULT FARRAR,
Attorneys for Plaintiffs in Error.

Motion and Order for Writ of Error to Operate as a Supersedeas. Entered and Filed 15th April, 1886.

United States Circuit Court, Eastern District of Louisiana.

THE HEIRS OF A. W. BOSWORTH
v.
THE ILLINOIS CENTRAL RAILROAD CO. } No. 11178.

On motion of Th's J. Semmes and Girault Farrar, of counsel for defendant and for the Chicago, St. Louis and New Orleans Railroad Company, called in warranty, it is ordered that a writ of error be

allowed to said defendant and said Chicago, St. Louis and New Orleans Railroad Company from the judgment herein rendered on the seventh day of April and signed on the twelfth day of April, 1886, to the Supreme Court of the United States, said writ to be re-
61 turnable to said Supreme Court on the second Monday of October next and to operate as a supersedeas, on the execution of a bond, with surety, according to law, in the sum of one thousand dollars.

Writ allowed, to operate as a supersedeas.

April 15, 1886.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for Writ of Error. Filed 15th April, 1886.

United States Circuit Court, Eastern District of Louisiana.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY. } 11178.

Know all men by these presents that we, The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company, as principals, and David B. Morey, of the city of New Orleans, as surety, are held and firmly bound unto Mil-
62 lard Bosworth and Charles H. Bosworth in the full and just sum of one thousand dollars, to be paid to the said Millard Bosworth and Charles H. Bosworth, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Millard Bosworth and Charles H. Bosworth were plaintiffs and The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company were defendants, judgment was rendered against the said Illinois Central Railroad Company and the
63 said Chicago, St. Louis and New Orleans Railroad Company, defendants; and the said Illinois Central Railroad Company and the said Chicago, St. Louis and New Orleans Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Millard Bosworth and the said Charles H. Bosworth, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Illinois Central Railroad Company and the said Chicago, St. Louis and New Orleans Railroad Company shall prosecute said writ to

effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to re-
64 main in full force and virtue.

(Signed) ILLINOIS CENTRAL RAILROAD COMPANY,
By FARRAR & SIMONDS AND
THOS. J. SEMMES, *Att'ys.* [L. S.]

(Signed) CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY,
By FARRAR & SIMONDS AND
THOMAS J. SEMMES, *Att'ys.* [L. S.]

(Signed) D. B. MOREY. [L. S.]

Sealed and delivered in the presence of—
(Signed) GIRAULT FARRAR.
(Signed) J. L. GRASHOFF.

Bond and surety approved.
(Signed) FARRAR & KRUTTSCHNITT, *Att'ys.*

Bond approved.
April 15, 1886.
(Signed) EDWARD C. BILLINGS, *Judge.*

65 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 64 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of The Heirs of Bosworth *v.* Illinois Central Railroad Company *et al.*, No. 11178 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30th day of June, A. D. 1886.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of June, A. D. 1886.

EDWARD C. BILLINGS, *Judge.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Millard Bosworth and Charles H. Bosworth and The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company, a manifest error hath happened, to the great damage of the said Illinois Central Railroad Company and the Chicago, St. Louis and New Orleans Railroad Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 17th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the United States Circuit Court
for the Eastern District of Louisiana.

[Endorsed:] United States circuit court. No. 11178. The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company, plaintiffs in error, *versus* Millard Bosworth and Charles H. Bosworth, defendants in error. Writ of error. T. J. Semmes and Girault Farrar, attorneys of plaintiffs in error. No. —. U. S. circuit court, eastern district of Louisiana. Filed April 17, 1886. E. R. Hunt, clerk.

67 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Millard Bosworth and Charles H. Bosworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The

Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company are plaintiffs in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment rendered against the said The Illinois Central Railroad Company and the Chicago, St. Louis & New Orleans Railroad Company, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17 day of April, in the year of our Lord one thousand eight hundred and eighty-six.

EDWARD C. BILLINGS, *Judge.*

68 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11178. The Illinois Central Railroad Company & The Chicago, St. Louis and New Orleans Railroad Company, plaintiffs in error, *vs.* Millard Bosworth & Charles H. Bosworth, d'f'ts in error. Citation.

Service of within citation in error accepted for each of the defendants in error named therein.

New Orleans, La., April 24th, 1886.

E. B. KRUTTSCHNITT,
E. H. FARRAR,
Att'ys for Def'ts in Error.

69 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Charles H. Bosworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company are plaintiffs in error and you and Millard Bosworth are defendants in error, to show cause, if any there be, why the judgment rendered against the said The Illinois Central Railroad Company and the Chicago, St. Louis and New Orleans Railroad Company, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17 day of April, in the year of our Lord one thousand eight hundred and eighty-six.

EDWARD C. BILLINGS, *Judge.*

70 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11178. The Illinois Central Railroad Com-

pany & The Chicago, St. Louis & New Orleans Railroad Company, plaintiffs in error, *vs.* Millard Bosworth & Charles H. Bosworth, def'ts in error. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed April 27, 1886. E. R. Hunt, clerk.

Marshal's Return.

Received Apr. 17, 1886, by the U. S. marshal, and on the 20 day of Ap'l, 1886, served a true duplicate of the within citation in error on Charles H. Bosworth, defendants herein, by handing the same to him in person.

R. B. PLEASANTS,
U. S. Marshal, E. D. La.,
By JNO. BAKER,
Deputy U. S. Marshal.

I, John Baker, being duly sworn, do depose and — that I am a lawful deputy of the U. S. marshal for the eastern district of La., and that the service as herein reported as made by me is true and correct.

JOHN BAKER.

Subscribed and sworn before me April 22, 1886.

H. J. CARTER,
Deputy Clerk United States Circuit Court,
Eastern District of Louisiana.

71 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Millard Bosworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company are plaintiffs in error and you and Charles H. Bosworth are defendants in error, to show cause, if any there be, why the judgment rendered against the said The Illinois Central Railroad Company and the Chicago, St. Louis and New Orleans Railroad Company, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17 day of April, in the year of our Lord one thousand eight hundred and eighty-six.

EDWARD C. BILLINGS, *Judge.*

72 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11178. The Illinois Central Railroad Com-

pany & The Chicago, St. Louis and New Orleans Railroad Company, plaintiffs in error, *vs.* Millard Bosworth & Charles H. Bosworth, d'f'ts in error. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed April 22, 1886. E. R. Hunt, clerk.

Marshal's Return.

Received Ap'l 17, 1886, by the U. S. marshal, and on the 21 day of Ap'l, 1886, I served a true duplicate of the within citation in error on Millard Bosworth, Esq., defendants herein, by handing the same to him in person, at his domicile, in St. Mary's p'h, 110 miles from New Orleans.

R. B. PLEASANTS, *U. S. M.*,
By DAN. A. ROSE,
D'y U. S. M., E. D. L.

I, Dan'l A. Rose, being duly sworn, do depose and say that I am a lawful deputy of the U. S. marshal for the eastern district of La., and that the service herein reported as made by me is true and correct.

DAN. A. ROSE,
D'y U. S. Marshal.

Subscribed and sworn before me April 22, 1886.
H. J. CARTER,
Deputy Clerk United States Circuit Court,
Eastern District of Louisiana.

73 *Reasons for Judgment. Filed 7th April,* 1886.

United States Circuit Court, Eastern District of Louisiana.

HEIRS OF A. W. BOSWORTH
v.
ILLINOIS CENTRAL RAILROAD COMPANY *et al.* } No. 11178.

In this case, submitted on an agreed statement of facts to the court, a jury being waived, we are of the opinion that the case made is controlled by the decisions of the Supreme Court of the United States in the cases of Wallach *et al v.* Van Riswick, 92 U. S., 202; Semmes *v.* United States, 91 U. S., 21; and French *v.* Wade, 102 U. S., 132, as to title, and by article 569 of the Civil Code of Louisiana, and the decisions of the supreme court of Louisiana in the cases of Brugere *v.* Heirs of Slidell, 27th Ann., 70, and Pendergast *v.* Schwartz *et al.*, 30th Ann., 590, as to the improvements. Judgment will therefore be entered for the plaintiffs overruling all exceptions
74 and recognizing their ownership of the property in question.
Judge Billings concurs.
(Signed) DON A. PARDEE, *Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of court, at the city of New Orleans, this 30th day of June, 1886.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

ED. R. HUNT, *Clerk.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 346. The Illinois Central Railroad Company and The Chicago, St. Louis and New Orleans Railroad Company, plaintiffs in error, *vs.* Millard Bosworth and Charles H. Bosworth. Filed September 17, 1886.

In the Supreme Court U. S.
FILED
OCT 22 1889
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 79.

OCTOBER TERM, 1889.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.,
PLAINTIFFS IN ERROR,

vs.

MILLARD BOSWORTH AND CHARLES H. BOSWORTH,
DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

GIRAULT FARRAR,
THOS. J. SEMMES,
JAMES FENTRESS,
Of Counsel for Plaintiffs in Error.

L. GRAHAM & SON, PRINTERS, 99-103 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

No. 79.

October Term, 1889.

ILLINOIS CENTRAL RAILROAD COMPANY Et Al.,
Plaintiffs In Error,

vs.

MILLARD BOSWORTH AND CHARLES H. BOSWORTH,
Defendants In Error.

Error to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

ASSIGNMENT OF ERRORS.

First. The Circuit Court erred in overruling the exception of the Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error, to the capacity of the defendants in error to sue.

Second. The Circuit Court erred in overruling the exception of no cause of action filed by the said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Third. The Circuit Court erred in overruling the plea of prescription filed by said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Fourth. The Circuit Court erred in rejecting the reconventional demand of the Illinois Central Railroad Company, one of the plaintiffs in error, for the value of improvements placed on the lots of ground described in the petition.

Fifth. The Circuit Court erred in holding that the special pardon of A. W. Bosworth, set up in the pleadings, and the General Amnesty Proclamation of December 25, 1868, had not the effect of restoring to said A. W. Bosworth the power of selling and disposing of the lots of ground in question after the termination of the life estate conveyed at the confiscation sale, and of blotting out the offense committed by him and thereby enabling him to exercise all his rights as to said property, except in so far as the same had been conveyed to Burbank, the purchaser at said confiscation sale, and investing him with power to bind his heirs by any warranty in reference thereto.

The plaintiffs in error were defendants below in an action of ejectment, called a petitory action in the Code of Practice of Louisiana, brought by Millard Bosworth and Charles H. Bosworth to recover title and possession of certain valuable real estate, with batture rights and accretions, in the possession of the Illinois Central Railroad Company in the city of New Orleans, together with the buildings and improvements thereon and the rents and revenues yielded by the land sued for, from the eleventh day of October, 1885. Rec. p. 3.

The averments of the petition (declaration) in this suit are, that they (defendants in error) are the only legitimate children of Abel Ware Bosworth, who died in New Orleans on the eleventh day of October, 1885; that they have accepted the succession of said Bosworth *under benefit of inventory;* that the said A. W. Bosworth, having taken part in the war of the rebellion, and having done acts which made him liable to the penalties prescribed in the act of Congress approved July 17, 1862, known as the "Confiscation Act," the Government of

the United States did, in accordance with the provisions of said confiscation act, seize, condemn, and sell under proceedings No. 7973 of the docket of the District Court of the United States for the district of Louisiana, styled, "United States versus the batture property of A. W. Bosworth," "all the right, title, and interest of the said A. W. Bosworth," consisting of a one-sixth undivided part or interest in and to the property in controversy, being the same property acquired by the said Abel W. Bosworth by purchase from Palfrey & Denton, as per act before Edward Barnett, notary public, passed on the twenty-sixth day of April, 1860; that at sale under the *renditioni exponas* in said cause No. 7973, in May, 1865, the said property was adjudicated by the United States marshal to E. W. Burbank; that under and by virtue of the said act of July 17, 1862, and under and by virtue of the joint resolution of congress, passed simultaneously therewith, they (the defendants in error) did, upon the death of their said father, become the owners in fee simple of the said property, with all the buildings and improvements thereupon situated, and become entitled to the rents and revenues accruing therefrom from the eleventh day of October, 1885." Rec. p. 1, 2, 3.

The Illinois Central Railroad Company filed an answer admitting that it was in possession of the property as lessee, denying that the title was in the plaintiffs (defendants in error), and setting up its right of possession and use of the land under said lease for four hundred years, and claimed the value of improvements put by it on the land in good faith, and without notice, and called its lessor, the Chicago, St. Louis & New Orleans Railroad Company, in warranty to defend the suit, who it averred was the true owner of the property, and whose title is set forth, Rec. pp. 5, 6, 7, 8, 9, 10, 11, 12. This latter company, called in to defend, filed certain exceptions and pleas to the suit. These all being overruled, it filed answer, setting up the general issue, and adopting the answer filed by its lessee and codefendant, the Illinois Central Railroad Company. Rec. pp. 13, 14. The cause was tried and submitted to the court on an

agreed statement of facts in the nature of a special verdict (jury being waived), and there was judgment for the defendants in error. Rec. pp. 15, 16, 17, 19. To reverse this judgment this writ of error was sued out.

ASSIGNMENT OF ERRORS.

First. The Circuit Court erred in overruling the exception of the Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error, to the capacity of the defendants in error to sue.

Second. The Circuit Court erred in overruling the exception of no cause of action filed by the said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Third. The Circuit Court erred in overruling the plea of prescription filed by said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

Fourth. The Circuit Court erred in rejecting the reconventional demand of the Illinois Central Railroad Company, one of the plaintiffs in error, for the value of improvements placed on the lots of ground described in the petition.

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As the last assignment of error involves the very merits of the case, we will discuss that assignment first.

I.

The Chicago, St. Louis & New Orleans Railroad Company, one of the plaintiffs in error, claims title to the property in controversy as owner through mesne conveyances derived from A.

W. Bosworth, the father of the defendants in error, who sold and conveyed it to Samuel H. Edgar, on September 23, 1871, with full warranty under the laws of Louisiana, and for valuable consideration. Rec. pp. 10, 11, 16. Edgar conveyed to the New Orleans, Jackson & Great Northern Railroad Company, on the tenth day of October, 1872, with full warranty and for like consideration. On December 18, 1872, Burbank, the purchaser at confiscation sale, conveyed to Edgar all his right, title, and interest in the nature of a quit claim deed. Rec. p. 16. The New Orleans, Jackson & Great Northern Railroad made a mortgage on May 1, 1872, covering all its property, real and personal, present and future, rights and franchises, including the right to be a corporation, and issued and negotiated the bonds secured by this mortgage. Upon the default of the mortgagor in the payment of interest upon these bonds, and continuance therein, as provided in said morgage, a bill was filed in the United States Circuit Court for Louisiana, by creditors, in December, 1876, for foreclosure, and after due proceedings a decree was regularly rendered on the 19th day of December, 1876, by the Circuit Court of the United States, directing the sale of all the property, real and personal, rights, franchises and powers, and all the right, title, and estate of the said New Orleans, Jackson & Great Northern Railroad Company, and said decree was carried into execution by sale at public auction in accordance with the decree, after regular advertisement, and all due formalities, on the seventeenth day of March, 1877, and all the property of said company, including the property in controversy, was sold to certain purchasers, who were organized into a corporation under the laws of Louisiana, and vested with all the rights, powers, franchises, and property of the New Orleans, Jackson & Great Northern Railroad Company. Said corporation having consolidated with the Central Mississippi Railroad Company, forming the Chicago, St. Louis & New Orleans Railroad Company, plaintiff in error, this last company was chartered by act of the legislature of Louisiana, No. 89, of 1878, approved, March 13. A. W. Bosworth, the father

of defendants in error, died intestate, on the eleventh day of October, 1885. All this is fully set forth in detail in the answers of the plaintiffs in error, and in the agreed statement of facts found by the court in the nature of a special verdict. Rec. pp. 6, 7, 8, 9 10, 11, 12, 15, 16, 17.

The question then arises, Are defendants in error bound by this sale made by their father, Bosworth, who was under no disability or incapacity, to Edgar, with full warranty and for full consideration, which has enured to the heirs' benefit? Or can they take the property, in the face of these obligations, and retain the benefit of the price paid to their ancestor?

To determine this vital question it must first be ascertained how these children derive title; whether as heirs of Bosworth, or as purchasers from some other source, as from the Government of the United States, under the effect of the statutes, the act of Congress of July 17, 1862, and the Explanatory Joint Resolution passed along with the act. In short, do they take by inheritance or by purchase?

It is elementary at common law that these two means of acquiring property are exhaustive and exclusive; and the nine different ways of acquiring property known to the civil law are easily reducible to these two heads.

Mourlon, Répétitions Ecrites, Vol. 2, Book 3, p. 3, sec. 5.

Laurent, Cours Elémentaire du Droit Civil, Vol. 2, Book 3, sec. 1.

It is not possible to determine with certainty from the vague, dubious, and non-committal language of the petition (declaration) what their source of title is, whether inheritance or purchase. As, however, the endorsement of the petition in the style of the cause bears the legend, "Heirs of A. W. Bosworth vs. Railroad Company," and as these parties allege that upon the death of Bosworth they became owners, we

may fairly assume that defendants in error claim *qua* heirs, not *qua* purchasers, grantees or donees from the United States under this statute. They aver in their petition that they are children, though of full age. "If children, then heirs," to use the expression of the great apostle to the gentiles. It has, moreover, been unanimously decided by this court, in the very recent cases of Avegno vs. Schmidt, 113 U. S. 293, and Shields vs. Schiff, 124 U. S. 351, that upon the death of the owner of real property which had been confiscated in his hands and sold to a purchaser by judicial proceedings under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of rebels, and for other purposes," the heirs take *qua* heirs under the *lex rei sitæ*, and not by donation from the generosity of the Government, that is, by purchase.

In the last cited case this court, quoting the masterly opinion of Mr. Justice Fenner, of the Supreme Court of Louisiana, says: "The learned justice then proceeds to demonstrate from the words of the act of congress, July 17, 1862, and the explanatory resolution, that they make no disposition of the property confiscated after the death of the owner, but leave it to devolve to his heirs according to the *lex rei sitæ*, and that those heirs take *qua* heirs and not by donation from the Government." Prior to the decision of this court in the Avegno case it never had been distinctly decided whether the children of an offender at his death took as heirs or as purchasers; it was not quite clear from the decisions of Wallack vs. Van Riswick, 92 U. S. p. 202; Chaffraix vs. Schiff, 92 U. S. 214; Pike vs. Wassell, 94 U. S. 711, and French vs. Wade, 102 U. S. 132; and this court, in construing these decisions in the Avegno case, admits this very difficulty. The court, in the Avegno case, says: "These decisions alone considered apparently sustain the contention of the plaintiffs that a decree in the suit to foreclose the mortgage to which Avegno (the offender) was the sole defendant, was without the necessary parties and was, therefore, void for want of jurisdic-

tion in the court to render it." The court then considers the nature and effect of the *pact de non alienando* in a Louisiana mortgage, and quoting further extracts from Wallack vs. Van Riswick, 97 U. S. 202, observes: "These extracts show that it was the opinion of the court that the children of a person, whose estate was condemned under the act of July 17, 1862, took at his death by descent, as his heirs, the fee simple, and did not derive their title from the United States or by virtue of the confiscation act. Avegno, the mortgagor, was, therefore, the only person necessary to be made the party to the suit brought by Morgan to foreclose his mortgage, and the proceedings and sale were valid and binding on the plaintiffs." In both of the above cases the plaintiffs in error insisted that they were not claiming as heirs, but as third persons, and that they were not bound in proceedings directed solely against the offender for that reason. This court held that they were so bound, because they were heirs and took as heirs. In the Schiff case, 124 U. S. 351, the mortgage foreclosure was attacked on the ground that the mortgage notes were prescribed on their face, and that the mortgage had lapsed as to them by failure to reinscribe it, and was legally dead and non-existing when the executory process was sued out; but the court held that "neither inscription nor reinscription are necessary to keep a mortgage alive as against the mortgagor or his heirs," and the mortgagor having neglected to plead prescription his heirs were estopped by this failure.

If it be true that the heir in a suit to recover property is estopped by the mere failure of his ancestor to plead prescription on a prescribed debt, and a dead mortagage, is he not estopped *for a stronger reason* by the ancestor's conveyance of this land, after he has been fully pardoned for the offense for which it was condemned, and with full warranty, and for full consideration, which must have enured to the benefit of the heir? This is the whole question before the court: Does the stream rise higher than its source? Are a man's heirs, in law or in ethics, in any better position than he or his creditors claiming from him as to what the heirs claim only by inheritance

from him? Is the apostle right in his argument that the priesthood of Aaron, standing in Abraham's shoes, is not higher or nobler than the priesthood of the order of Melchizedek, to whom Abraham himself paid tithes and admitted his obligation and inferiority by taking a blessing at his hands?

Defendants in error insist, however, that under the decisions of this court in Wallack vs. Van Riswick, 92 U. S. 202; Chaffraix vs. Schiff, 92 U. S. 214; Pike vs. Wassell, 94 U. S. 711, and French vs. Wade, 102 U. S. 132, it was unequivocally and distinctly held that after condemnation and sale by judicial proceedings under the act of July 17, 1862, of the real estate of one engaged in rebellion against the United States, there is "left in him no interest or estate of any description which he could convey by deed, and no power which he can exercise in favor of another." And that under the decision of the Wade case they "are not estopped by their ancestor's warranty from asserting their title."

The Circuit Court in its opinion would not see any distinction between the case at bar and Wallack vs. Van Riswick, and Wade vs. French, and Pike vs. Wassell, and did not even refer at all to the recent cases, the last of which was not decided by this court at that time.

In the first place, we distinguish our case from the Wallack case, by the fact that when Wallack on Feb. 3, 1866, sold his equity of redemption to Van Riswick, who had acquired the rights of the purchaser at confiscation sale, he was still a rebel; the disabilities imposed by his offense and declared by the judgment of confiscation still rested upon him; he had never been pardoned, and the war to put down the rebellion had not yet terminated, in contemplation of law. It was decided by this court in "The Protector" 12 Wallace, 700; in Brown vs. Hyatt, 15 Wall. 177; in United States vs. Thomas, 15 Wall. 337; in Adger vs. Alston, 15 Wall. 557, that the war legally ended on April 2, 1866, when the proclamation of the President declared it at an end, and that the statutes of limitations interrupted by the war only began to run from that date. So the war was not legally ended when Wallack attempted to convey.

Bosworth's property was confiscated and sold in May, 1865, and he was pardoned by the President of the United States in October, 1865, by special warrant of pardon, and never attempted to exercise any rights or powers as to the confiscated land until (in 1871) long after the war was over and his pardon had restored to him "all that was not sold and had not vested in the purchaser or any third person." Rec. p. —. In the Wade case (Wade vs French, 102 U. S. 132), Wade, the rebel, went to the confiscation sale, and bought in his own property, in sheer contempt of the whole proceedings in condemnation and of the Government itself; and then, with all his disabilities as a rebel enemy still upon him, liable to have the very same property seized and sold again, and himself tried for treason, sold the property only ten days after and attempted to warrant the purchaser against any and every attack, whether by the Government, or by his heirs, to recover that which the law would have mercifully saved for the heirs out of the wreck of his wasted patrimony. This court, in Wallack's case and Wade's case, held that the "purpose as well as the justification of the act of July 17, 1862, was to strengthen the Government and to enfeeble the public enemy, by taking from that enemy the power to use their property in aid of the hostile cause. With such a purpose it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein which he might sell, and with the proceeds of which he might aid in carrying on the war against the Government." Wallack vs. Van Riswick, 92 U. S. 207. And again, on p. 209 it is held, "If, notwithstanding, an adjudicated forfeiture of his land and a sale thereof be (the offender Wallack) was still seized of an estate expectant on the determination of a life estate, which he could sell and convey, his power to aid the public enemy thereby remained." And the court held that the saving of the fee from condemnation and sale necessarily implied in the joint resolution was done to satisfy the constitutional objections of President Lincoln and others, and to enable the heirs to inherit the land after the offender's death, by leaving something

to descend to them as an inheritance. The court further held in the Wallack case that the General Amnesty Proclamation, issued Dec. 25, 1868, had not the effect of restoring to Wallack his forfeited property, or any interest in it, and that the amnesty, as to Wallack's conveyance, had no retroactive effect; that it did not validate his utterly void act of sale made in 1866, at a time when his disability as a rebel enemy still rested upon him, and when the reasons for which his property had been confiscated might still be existing. Public policy, the manifest intention of Congress, and the dictates of judicial prudence weighed with the court in holding Wallack had no capacity to sell anything of this estate *at a time when he still was a rebel and an enemy.* The very attempt to do so, at this time, was in itself offensive, and the Amnesty Proclamation, while it blotted out his offenses committed during the rebellion, could not be so construed as to ratify and give him capacity as a loyal citizen to do that which he had no legal right as an enemy and a rebel to do, and which appeared to be in plain contempt of the confiscation act. While it is true that the "quality of mercy is not strained," it is equally true that "we shall not continue in sin, that grace may abound," Romans, vi, 1, 15. Grace is not to be magnified by encouraging the sinner to sin more. The office of pardon is not to blot out the law, but to "magnify the law and make it honorable."

The Wade case rests exactly upon the same grounds, though no question of amnesty or pardon, whatever, is involved in his case. Wade's "heirs were not estopped by his warranty from asserting their title," simply because he was not a loyal citizen, could make no warranty, and he (and no other rebel) at this time had capacity to deal with this land, or to do any act which might or could paralyze the action of the nation against it's rebellious citizens. No construction which could work such a result would be given by the court to the confiscation act.

The case of Pike vs. Wassell, 94 U. S. 711, resting upon the same reasons, clearly has no bearing on this case, for the ob-

vious reason that Pike's creditor, who got out attachments against his land in the state courts, did not seize certain lots of it, until after the United States Court had seized them under the confiscation act of July 17, 1862, and its jurisdiction as to them had become exclusive. This creditor afterwards bought what was sold at the confiscation sale, an estate in the lands for the life of Albert Pike. The sale provoked by the creditor under his attachment in the state court was mere nullity as to those lands which had first been seized by the Government. Consequently, says the court, "as to this property, the attachment was defeated by the decree of condemnation, and the defendants acquired no title through the proceedings in the state court. All the interest they have in it comes through the confiscation sale and terminates upon the death of Albert Pike." They had no other interest in it, because they did not acquire any other by their attachment proceedings.

This holder of the life estate intended to let the property go to waste, and be sold for taxes, and the heirs brought a bill in equity for relief. The court held that as between the heirs, whose eventual rights had never been disposed of, and this purchaser of the life estate, the suit was properly brought. "They, at least," said the court, "appeared to have the estate in expectancy. Under these circumstances, as there is no one else to look to the interests of the succession, we think they may be properly permitted to do whatever is necessary to protect it from forfeiture or encumbrance." This was unquestionably right. Pike was a rebel. The proceedings in the District Court against his property, on this ground, put that portion seized by the United States beyond his reach or that of his creditors. The offended Government" rights having first attached by seizure, no state court and no other power could step between the offended sovereign and its prey; it's claim was paramount to all others at this time.

Whether this creditor of Pike legally lost a part of his claim, by failure to fully realize upon his claims out of the lands sold by the Government at confiscation sale, is not de

cided in the Pike case, nor is it decided that the heirs of Pike could not be held liable as heirs for such unsatisfied claim is existing against their father at his death, but simply that the creditor did not acquire fee simple title by his purchase at the confiscation sale, and that the sale by the state court of those lots which had first been seized by the United States passed no title whatever.

This court has held, conformably to this view of the decision, that mortgage creditors ought not to be allowed to intervene in confiscation proceedings. Claims of Marcuard et al., 20 Wall.; Waples vs. Hays, 108 U. S. 6, etc. And this was the uniform practice in the District Courts in these confiscation cases. Creditors' rights are not divested by judicial proceedings under the act of July 17, 1862.

So long as the seizure of the Government was pending, or the judgment of condemnation remained unsatisfied against the offender, or the reasons for it were in force and effect, neither the offender nor his creditors could touch the property. The judgment of condemnation, and the very reasons for it, lose their force and effect by the death of the offender in the one case, and upon his full pardon before the war ended in the other. No question of pardon or amnesty was raised or discussed in the Pike case, and none was referred to by the court in its opinion. Pike, "the old man, was yet alive," when his heirs brought this bill; and this was the main ground of the demurrer, as is shown by Judge Dillon's opinion in the case. 2 Dillon Circuit Court Rep. 555; he says: "I place my decision upon the sole ground that the plaintiffs, during the life of their father, are not his heirs and are not now entitled to be considered as the reversioners or possessed of any estate in this property." But this court said: "They are the heirs apparent or presumptive; they appear to have the estate in expectancy," hence they must be heard in their prayer, that their interests in the inheritance *not yet disposed of* be protected from forfeiture or incumbrance, since Pike, the ancestor, either would not, or by reason of his disability or incapacity could not, appear to protect it.

The case of Chaffraix vs. Schiff, 92 U. S. 214, is decided solely "upon the reasons given in Wallack vs. Van Riswick."

None of the reasons found by the court in the Wallack case, the Chaffraix case, the Pike case, or the Wade case apply here, because Bosworth never attempted to defeat the Government's policy, or to deal with what it had "laid its mailed hand upon;" but straightway went to Washington, a penitent, and sued for and obtained grace and forgiveness at the hands of his offended Government. The President issued to him a special Warrant of Pardon on October 2, 1865, of which he signified his unqualified acceptance in writing on October 5, 1865. In the fulness of time the President issued the General Amnesty Proclamation, free to all rebels and offenders, unconditional and absolute on the twenty fifth day of December, 1868, a day the most auspicious in all the calendar for this gracious event. Bosworth was "regenerated," "born again" into the kingdom of his united country by the hearty acceptance of his special pardon, and the gracious terms of the General Amnesty Proclamation.

Could his heirs be heard to dishonor him and his conveyance made for valuable consideration after these pardons?

What is the nature and legal effect of a pardon, and what are its limits? This court said in Knote vs. U. S., 95 U. S. p. 153: "A pardon is an act of grace by which the offender is released from the consequences of his offense, so far as such release is practicable, and within the control of the pardoning power, or of the officers under its direction. It releases the offender from all the disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity and rehabilitates him to that extent in his former position, but it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person, by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Govern-

ment any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which had vested in others, directly by the execution of the judgment for the offense, or which has been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon, and if the proceeds of the sale have been paid to the party to whom the law has assigned them, they can not be subsequently reached and recovered by the offender; the rights of the parties have become vested, and are as complete as if they had been acquired in any other legal way; so also if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. There is this limit to the pardoning power of the President, as there is to all his powers; it can not touch moneys once in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power. Where, however, the property condemned or its proceeds have not thus vested, but remains under the control of the executive or officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored, or its proceeds delivered to the original owner, upon his full pardon. The property and the proceeds are not considered as so absolutely vested in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them in the one case, or are covered into the treasury in the other."

The Knote case was a suit brought by Knote against the United States in the Court of Claims, to recover proceeds of

personal property confiscated by a decree of the United States District Court for West Virginia, under the act of July 17, 1862. Knote claimed that the General Amnesty Proclamation of December 25, 1868, being full, complete, and unconditional, restored to him *ex proprio vigore*, these proceeds, though actually in the treasury, and mingled with the Government's other money. The court held that the constitutional provision, "no money shall be drawn from the treasury but in consequence of appropriations made by law," was the limit of the pardoning power of the President.

In the case of Osborn vs. U. S., 91 U. S. 474, it was held, by an unanimous court, that a condition in the special pardon, to the effect "that the said A. B. shall not by virtue of this warrant claim any property, or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States," did not estop the recipient of a pardon to appeal to the court, and get the proceeds of his confiscated property, forfeited by decree of court under the confiscation act, but which proceeds were still held in the registry. This court not only ordered restitution of the proceeds to be made to Osborn, but made the recalcitrant officers pay all costs of the proceedings for restitution.

This court says in that case: "The pardon, as is seen, embraces all offenses arising from participation of the petitioner, direct or indirect, in the rebellion." It covers, therefore, the offenses for which the forfeiture of his property was decreed. The confiscation law of 1862, though construed to apply only to public enemies, is limited to such of them as were engaged in and gave aid and comfort to the rebellion. 12 Stat., sec. 7, p. 590.

The pardon of this offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the Government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offense. If, in the proceedings to establish his culpability and enforce the penalty,

and before the grant of the pardon, the rights of others than the Government have *vested*, those rights can not be impaired by the pardon. The Government having parted with its power, over such rights (*i. e., rights that have vested*), they necessarily remained as they existed previous to the grant of the pardon. The Government can only release what it holds, but unless the rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offense must fall with the pardon of the offense itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted. The condition annexed to the pardon of the petitioner does not defeat such operation in the present case.

But it is contended that as the bonds were forfeited to the Government by the decree of the District Court, there can be no restitution, except by grant or conveyance of some kind from the Government, and that the proprietary interests of the Government can only be disposed of by act of Congress.

The answer is, The forfeiture results, not from the decree of the court, but from the offense which the decree establishes and declares. The pardon, in releasing the offense, obliterated it in legal contemplation, and removes the ground of forfeiture upon which the decree rests, and the source of the title is then gone.

So in Young vs. United States, 97 U. S. 39, 66, and 68, this court says: "The President has the constitutional 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' Art. 2, sec. 2. The pardon is of the offense, and, *as between the offender and the offended Government*, shuts out from sight the offending act. This court has decided, in reference to the Abandoned and Captured Property Act, that a pardon relieves the owner of captured property from the necessity of proving he did not give aid and comfort to the rebellion, because the pardon is equivalent to actual proof of his unbroken loyalty. The language of the late Chief Justice, speaking for the court, in

the case of the United States vs. Padelford (*supra*), is, 'The law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion.' This is now the settled rule of decision here, and is not to be disturbed. We have decided that the pardon closes the eyes of the courts to the offending acts."

Young was a trustee in bankruptcy of Alexander Collie, a citizen and subject of Great Britain, and in this capacity brought suit in the Court of Claims under the abandoned and captured property act (12 Stat. 820).

The court held that Collie, being an alien, not a citizen, owing no natural allegiance to the United States, did not violate any, and hence, as an alien enemy, he was not included in the General Amnesty Proclamation of Dec. 25, 1868. "He was not," said the court, "within the scope of the pardoning power." * * * "It may be that foreigners who have given aid and comfort to the enemies of the United States are in equity as much entitled to the privileges of the act as the pardoned enemies themselves; but that is for Congress to determine and not for us." Mr. Justice Field alone dissented in this case. As his reasons for dissent are not published, and as it can not be inferred from his eloquent language in Osborn vs. United States and Knote vs. United States (*supra*) that he disapproved of the expressions used as to the nature and effect of the pardon in this case, he must have taken the equitable view of the matter.

The language quoted above is only the echo of the doctrine announced in all the cases on this subject.

Ex parte Garland, 4 Wal. 380.
Armstrong's Foundry, 16 Wal. 766.
Padelford's Case, 9 Wal. 531.
Klein's Case, 13 Wal. 154.
Mrs. Armstrong's Case, 13 Wal. 154.
Pargoud's Case, 13 Wal. 156.
Carlisle vs. United States, 16 Wal. 137.
Opinion of Attorneys General, vol. 8, 201.
Osborn vs. United States, 91 U. S. 474.

Knote vs. United States, 95 U. S. 149.
Young vs. United States, 97 U. S. 39.
Hart vs. United States, 118 U. S. 62.

In the recent case of Hart vs. United States, 118 U. S. 62, this court said: "It was urged before the Court of Claims that the pardon and amnesty granted by the President to Hart, on the 3d November, 1865, 'for all offenses committed by him arising from participation, direct or implied, in the rebellion,' operated to set aside the provisions of the joint resolution as to him and his claims. The court held otherwise. We are of opinion that the judgment of the Court of Claims was right. In approving, as we do, the reasons above cited, as assigned by that court, for the view it took on the question of the pardon, we do not depart in the least from what was held, on the subject of pardons, in the cases of *ex parte* Garland, 4 Wall. 333; Armstrong's Foundry, 6 Wall. 766; United States vs. Padelford, 9 Wall. 531; United States vs. Klein, 13 Wall. 128, and Carlisle vs. United States, 16 Wall. 147, 151. If the joint resolution had said nothing on the subject of pardon, no pardon could have had the effect to authorize the payment out of a general appropriation of a debt which a law of Congress had said should not be paid out of it. The pardon can not have such an effect ascribed to it, merely because the joint resolution says that it shall not have such effect."

Lucus a non lucendo is Roman pleasantry, but not good law.

The only case cited by the Circuit Court and, so far as we know, relied on by defendants in error, as affecting the operation of Bosworth's pardon and amnesty in the case at bar are Semmes vs. United States, 91 U. S. 21, and Wallack vs. Van Riswick, 92 U. S. 202.

The Semmes case is clearly not in point, because there, if

we are to judge by the language of the court, the plaintiff in error, Semmes, claimed that the pardon annulled the confiscation sale; that it took away from the purchaser and restored to him, Semmes, that which had been condemned and sold and vested in this third person. It was simply decided in this case that the pardon had no such effect on the vested rights of third persons. Of course not; a decree of this court reversing a judgment of condemnation, rendered by the District Court sitting as a prize court, would not restore the vessel condemned and sold to a purchaser under the decree of the court of prize, unless the court *a qua* had no jurisdiction. The claimant, in the event of reversal, would simply be remitted to the proceeds of the sale in the registry. So also in a case of seizure and sale under the revenue laws of the United States. 1 Woods, C. C. Rep. 232.

We apprehend that the claimants raised the question of no jurisdiction in the Semmes case.

The distinction between our case and the Semmes case is very clear. We do not claim here that the pardon and amnesty annulled the sale to Burbank, but only that they restored to the owner every right, title, and interest which was not sold to any third person, and that, after the pardon and amnesty, *the judgment of condemnation loses its force and effect*, except in so far only as the judgment was carried into execution and the rights under it vested in the purchaser. In other words, it seems to be the settled doctrine of pardon, announced by this court in its decisions, that its effect is substantially the same as that of a decree of the Supreme Court of the United States reversing a judgment of the lower court for error in a proceeding in Admiralty under the confis cation laws or the revenue laws.

The dictum as to the effect of amnesty in Wallack vs. Van Riswick, 92 U. S. 202, rests only upon what was expressly decided in Semmes vs. United States, 91 U. S. 21, the only case therein cited on that question, and the court in the conclusion of the opinion, as if not satisfied with the reasons of Semmes's case, says:

"Besides, the Proclamation of Amnesty was not made until Dec. 25, 1868." Therefore the judgment of confiscation and the reasons for it never lost their force and effect against Wallack until the day this proclamation was made. Wallack was a rebel, under disability until this day. Hence he was inhibited by plain reasons of public policy from dealing with this confiscated land, "until his change came."

It matters not to us where the fee dwells after condemnation and sale.

Since the decision of this court in Shields vs. Schiff, 124 U. S. 351, it is perfectly clear from what is said by this court and by Mr. Justice Poche, Chief Justice Bermudez, and Mr. Justice Fenner, of the Supreme Court of Louisiana, two of whom differed on this question, in the opinions which were quoted in that case, that the fee simple is either held by the Government in trust for the heirs, or else that it remains in the offender, but paralysed so far as voluntary alienation is concerned, so long as the judgment is in force.

The opinion of Chief Justice Bermudez, perhaps the ablest civilian on this side of the Atlantic, is that after condemnation the fee remains in the offender; and his opinion is not only fortified by reasons unanswerable, drawn from the very bowels of the civil law, but seems to be the doctrine of this court, in spite of the dictum in Wade vs. French. Concurring opinion of Chief Justice Bermudez in Shields vs. Schiff, 36 La. An. Rep. 644, 653, 654.

Rankin's Heirs vs. Rankin's Executors, 6 Mon. Ky. 531.
Borland's Case, 4 Mason 174.
Windsor vs. McVeigh, 93 U. S. 283.
Burbank vs. Conrad, 96 U. S. 293.
Kirk vs. Lynd, 106 U. S. 315.
Waples vs. Hays, 108 U. S. 6.
Ex parte Lange, 18 Wall. 177, 178.
Day vs. Micou, 18 Wall. 156.
Bigelow vs. Forrest, 9 Wall. 339.

In either event, the pardon restores the fee, or makes it alive again. As said by Mr. Justice Field in *ex parte* Garland, 4 Wall.: "It is not within the constitutional power of Congress to thus inflict punishment beyond the reach of executive clemency." Any other doctrine would nullify the Power of Grace resident in the Chief Magistrate of this great nation, and would convert his warrant of pardon into a mere *brutum fulmen*.

The President was the officer whose duty it was to cause the seizures to be made under the confiscation act. He was the one to set the machinery of the courts in motion, by ordering the seizure. Was not the President competent to determine the question of defendant's loyalty afterwards? The pardon is as between the Government and the rebel, and removes all personal disability; and the confiscation decree imposed only a "disability personal and temporary." (*Dictum* of Lord Coke, quoted in Wallack vs. Van Riswick.) "Who shall say anything to the charge of God's elect? It is GOD that justifieth." Who shall say, "thou rebel," when the Government itself has pardoned?

That our view of what was decided in these cases of Wallack, Wade, Chaffraix, and Pike is right, is apparent from a consideration of the cases of Chaffraix vs. Schiff, 92 U. S. 214, and Shields vs. Schiff, 124 U. S. 351.

The Chaffraix case was decided at the same time as Wallack vs. Van Riswick, "for the reasons given in Wallack vs. Van Riswick," involved an identical state of facts, and immediately follows it in the same volume. It was a suit in equity by Schiff to compel specific performance of an agreement made with Chaffraix to purchase real estate. Chaffraix defended, on the ground that the title tendered was not a good title in law, and would be defeasible at the death of one Eustace Surget in a suit by Surget's heirs. The property involved in the Chaffraix case had been seized, libelled, condemned, and sold by the United States District Court for Louisiana in proceedings under the act of July 17, 1862, as the property of Eustace Surget, a rebel. At the marshal's sale, under the *venditioni exponas* in said cause, Schiff became the purchaser,

and having a mortgage on the property, securing a large debt, he bid it in for a part of his mortgage, paid costs of court, and credited the total amount bid, $22,000, on the notes. Having done this, he made an agreement before a notary public with the rebel, Surget, the mortgagor, to release the property absolutely unto him, Schiff, by quit claim deed, so as to vest in him an absolute title in fee to the premises, and at the same time to *satisfy* Schiff's claims as mortgagee against Surget.

This court held that "the title thus acquired is not a complete and valid one; that it is ineffective beyond the life of Surget, and his release could not enlarge it." Hence, this court reversed the decree of the Circuit Court, which had sustained the bill. Chaffraix vs. Schiff, 92 U. S. 214.

Schiff foreclosed this identical mortgage in the Civil District Court of New Orleans in January, 1880, making the ex-offender Surget the alone party defendant to the proceedings by service on a *curator ad hoc*, appointed by the court to represent Surget, who was now in Europe, an absentee. These mortgage notes sued on were barred by prescription, and the mortgage had not been kept alive by inscription in the mortgage office, hence it was perempted by the lapse of more than ten years when these proceedings were taken in 1880.

The *curator ad hoc* did not plead prescription or peremption to these proceedings, but merely acted on instructions from Surget, and let the property be sold at sheriff's sale in full satisfaction of Schiff's mortgage. Surget died in 1882, and his heirs-at-law brought suit to eject Schiff. They claimed that their rights had been recognized by this court in the case of Chaffraix vs. Schiff, 92 U. S. 214; that the foreclosure suit brought by Schiff and the proceedings thereunder were *consent proceedings*, not binding on them, as they were not parties to it; that the debt was barred by prescription and the mortgage was no longer a mortgage when foreclosed; that the whole proceeding in foreclosure was *an attempt by Surget to do indirectly that which this court said he could not do directly*. This court held that Schiff had acquired an indefeasible title in fee by these foreclosure proceedings. Shields vs. Schiff, 124 U. S. 351.

The two cases, Chaffraix vs. Schiff and Shields vs. Schiff, involved title to the very same property, presented legally and practically the same question for decision, and was between the same parties or their privies. In the Chaffraix case it was decided that Schiff had only an estate for the life of Surget, and that Surget's voluntary release did not enlarge the title acquired by the confiscation sale. In the Schiff case it was held, after Surget's death, that Schiff did acquire a title in fee under the foreclosure proceedings against Surget alone on the notes now prescribed and the now lapsed mortgage.

How are these two apparently conflicting decisions to be reconciled, or does the latter one, Shields vs. Schiff, overrule the Chaffraix case, and its companion decision resting upon the same grounds, Wallack vs. Van Riswick?

This is a *dilemma;* either horn of it is satisfactory to the plaintiffs in error and fatal to the defendants in error.

Our view of these cases is the only way to reconcile these two decisions. Surget was, like Wallack, still a rebel; he had not been pardoned when he attempted to deal with the property. He could not be permitted to convey, contrary to Government's policy, so long as he was under disability—a suspect. He could not treat the confiscation act, or proceedings under it, with contempt. The reasons for which the confiscation was decreed might still remain in full force, and it was not only against public policy that a rebel should attempt to raise money by selling the fee, after the condemnation and sale of the life estate, but it might be dangerous. The fee was withheld from confiscation, not for the rebel's benefit, not because the Government could not condemn the fee under the constitution, but in pure mercy, for the sake of his heirs and his *bona fide* creditors. Hence, so long as the judgment remained in full force, so long as the very reasons for the judgment existed, and the rebellion was still flagrant, the rebel could not affect the confiscated property by any alienation or any encumbrance. It is true Surget did not raise any money on the remainder, but he attempted to alienate at a time when he had no legal capacity to do so, and

this attempt was clearly insulting to the Government and a fearful example to other rebels.

If his creditors had rights upon the property they could enforce those rights in the courts by compulsory process after the confiscation, because the confiscation did not disturb or divest those rights, but only placed the property beyond the rebel's power to deal with it by any voluntary act on his part, so long as the judgment of confiscation and the reasons for it were in full force and effect.

Day vs. Micou, 18 Wall. 156.

Claims of Marcuard, 20 Wall. 114.

Waples vs. Hays, 108 U. S. 6.

So if Van Riswick had foreclosed his deed of trust on Wallack's land, instead of dealing with Wallack, who was a rebel under disability, he would have acquired title in fee had he been the purchaser at the sale under his deed of trust.

If these decisions can not be justified on this ground, then on what ground can they be justified? Let the defendants in error attempt it.

It is true, there are some expressions in the cases of Pike vs. Wassell, Wallack vs. Van Riswick, and Wade vs. French, which seem to convey the idea that the condemnation was of the fee simple title, not simply of a life estate, or of an estate for life; and that, for that reason, the offender could not afterwards sell the fee, there being left nothing in him after condemnation; "that as to him the forfeiture was complete and absolute;" that "he had left in him no estate of any description, and no power which he could exercise in favor of another;" and in the Wade case it was said that "by the condemnation and sale Wade's estate was separated entirely from that of his heirs after his death."

In the first place, these expressions are to be interpreted

with reference to the exact point decided. Anything said outside of this and not fundamental to the decision is simply *obiter dictum.*

In the second place, if these expressions are to be regarded in the light of authoritative *dicta* upon the effect of the judgment of condemnation, as to *what was condemned*, there are many more expressions on this very subject which are directly in conflict with the above *dicta* in other cases, both earlier and later than the Wallack case and the Wade case.

Bigelow vs. Forrest, 9 Wall. 339.
Day vs. Micou, 18 Wall. 156.
Ex parte Lange, 18 Wall. pp. 177, 178.
Burbank vs. Conrad, 96 U. S. 293.
Kirk vs. Lynd, 106 U. S. 315.
Waples vs. Hays, 108 U. S. 6
Windsor vs. McVeigh, 93 U. S. 283.

In Burbank vs. Conrad, 96 U. S. 293, Mr. Justice Field says, "They (the United States) had caused his estate in the land, whatever that was, to be seized and condemned. By the decree of condemnation that estate vested in them (the United States) for the period of his (Conrad's) life. His estate for that period was then their property. The statute declares that the property condemned shall become the property of the United States and may be disposed of as the court shall decree. It was the property of the United States, therefore, which was sold and conveyed at the marshal's sale. The United States acquired by the decree, for the life of the offender, that which at the time of the seizure he actually possessed. It was in the power of Congress to provide for the confiscation of the entire property, as being within the enemy's country, *without limiting it to the estate remaining in the offender;* but not having done so the court can not enlarge the operation of the stringent provisions of the statute."

In Kirk vs. Lynd, 106 U. S. 315, 319, Chief Justice Waite, after discussing the very question why the act of August 6, 1861, directed against the property used in aid of the rebellion provided for an absolute condemnation of the fee, while the act of July 17, 1862, did not so provide, says, "The act of July 17, 1862, proceeds upon an entirely different principle. That was, according to its title, 'an act to suppress insurrection, to punish treason and rebellion, and to seize and confiscate the property of traitors.' Its object was not to authorize capture of property used to promote an insurrection, but to confiscate the property of traitors. The seizure was to be made, not because the property was in law the offender, but because the owners were engaged in the rebellion, and would not return to their allegiance to the United States. The object evidently was not to make the property a lawful subject of capture and prize, as in the act of 1861, but to punish the traitor for countenancing rebellion. This distinction is recognized in all the cases where the subject has received consideration. The justices who dissented from the judgment in Miller vs. United States (*supra*), while arguing that the act of 1862 was unconstitutional, impliedly admitted that of 1861, because it was directed against the property as the offending thing. It was also because the act of 1862 was in the nature of a punishment of the owner for his treason, that the explanatory resolution, No. 63, 12 Stat. 627, was passed to meet the objections which had been suggested by the President. In this way *the condemnation of real property under the act of* 1862 *was confined to the natural life of the offending owner.*"

So in Waples vs. Hays, 108 U. S. pp. 6, 8 and 9, Mr. Chief Justice Waite says, in speaking of the rights of Bradford, the mortgagee: "Bradford intervened for the protection of his interest in what was to be condemned. He could not in that suit foreclose his mortgage on the property; all he could get, and he sought to get, was payment out of the proceeds of any sale ordered in consequence of the condemnation. His mortgage covered the fee, but the suit in which he intervened was in its *legal effect only to subject the property for the life of the*

mortgagor. He was interested as well in what was to be condemned as *in what remained after the condemnation was exhausted.* In this way Waples (the purchaser at confiscation sale) got all the title the United States undertook to convey; that is to say, an unincumbered right to the use and enjoyment of the property during the life of Hays. He bought the property for the life of Hays, and that was all he bought. His position is that of tenant for the life of another."

In Windsor vs. McVeigh, 93 U. S. 283, Mr. Justice Field says: "It was held by this court in Bigelow vs. Forrest, 9 Wall. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive, that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of the court, having jurisdiction to make the decree, cannot be impeached collaterally; but under the act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction."

Chief Justice Waite was the author of the opinion in both Pike vs. Wassel and Wade vs. French, as was Mr. Justice Strong the author of Bigelow vs. Forrest, 9 Wall. 339; Day vs. Micou, 18 Wall., and Wallack vs. Van Riswick, 96 U. S. 202. It is very apparent that the latter *dicta*, above quoted, as to what was condemned, are in accord with Bigelow vs. Forrest, 9 Wall. 339; Day vs. Micou, 18 Wall., and *ex parte* Lange, 18 Wall. 177, 178, in which last case Mr. Justice Miller clearly shows that the very issue raised and decided in Bigelow vs. Forrest, 9 Wall. 339, was whether the fee simple was condemned, as contended by the purchaser, or only the estate for the rebel's life, as contended by his heir, and used this very point as an argument to show that a court could lawfully render no decree having any effect beyond that which the statute gave it power to have effect. The authority is thus overwhelming in the decisions of this court to the effect

that the fee is not condemned by the proceedings under the act of July 17, 1862.

If the fee was condemned, then it must have passed to the purchaser at the confiscation sale and there is nothing left for the heirs to inherit. Kirk vs. Lynd, 106 U. S. (quoted above).

Mr. Waples, in his work, "Proceedings in Rem," takes the view that the fee was condemned, because, says he, "the proceeding was one purely *in rem* against enemy property." He confesses that the only decision of this court in the confiscation cases that entirely bears him out in its *dicta* is the case of Semmes vs. United States, 91 U. S. 21. He has some fault to find with Miller vs. U. S., 11 Wall.; with McVeigh vs. U. S., 11 Wall., with Bigelow vs. Forrest, 9 Wall.; Day vs. Micou, 18 Wall.; *ex parte* Lange, 18 Wall.; the Confiscation Cases, 20 Wall. 92; Gregory vs. McVeigh, Windsor vs. McVeigh (*supra*), Wallack vs. Van Riswick, 92 U. S. 202; Pike vs. Wassell, 94 U. S. 711; Burbank vs. Conrad, 96 U. S.; Conrad vs. Waples, 96 U. S.; Wade vs. French, 102 U. S., and doubtless also with Waples vs. Hays, 108 U. S. 6, if his book had been written when that case was reported. Waples's Proceedings in Rem. xxxvii, xxxviii, pp. 366, 416.

The reasons given in Semmes vs. U.S., 91 U.S. 21, and repeated in Wallack vs. Van Riswick, 92 U. S. 202, as restricting the effect of the pardon and the amnesty, were the reasons of enemy ownership principally. It is clear that these were not the real reasons in Semmes vs. United States, or in Wallack vs. Van Riswick, unless it be held that Mr. Waples's view is right, that the fee was condemned, and that therefore all of the above decisions, constituting a vast majority of the decisions under the act of 1862 by this court, are wrong. Proceedings in Rem, pp. 490, 491, 492. It seems to us monstrous to take this view. The real reasons, therefore, in Semmes vs. United States, why his pardon did not take away from the purchaser the property was because the purchaser was a third person, and his right a vested right, and pardon can have no such effect; and for the same reason in Wallack vs. Van Riswick, 92 U. S. 202, the real reason for re-

stricting the operation of the amnesty in respect to Wallack's conveyance is expressed in the very last line of that decision. Hence we conclude the Circuit Court did err in holding that the case at bar is covered by Semmes vs. U. S., 91 U. S. 21, and Wallack vs. Van Riswick, 92 U. S. 202, upon the question of the effect of pardon and amnesty.

Judge Dillon said, in his opinion in Pike vs. Wassell, 2 Dillon C. C. 555, "it would be remarkable if Pike's (the rebel's) heirs could take his confiscated land discharged of their ancestor's debts." It must be said in this case if these heirs could take this land, in the face of their pardoned father's conveyance, and hold the price of it, too, it would be inconceivable.

This high tribunal will neither work iniquity by its decree, nor render a judgment which is foolishness.

Our title to the property in controversy was acquired in the faith of the decision of Bigelow vs. Forrest, 9 Wall., and the pardon cases, *ex parte* Garland, Armstrong's Foundry, and others, and our interpretation of Bigelow vs. Forrest was adopted by this court in Day vs. Micou, 18 Wall., *ex parte* Lange, 18 Wall., by the Supreme Court of Louisiana, in Micou vs. Benjamin, by Judge Dillon in Pike vs. Wassel (*supra*), and by Judge Woods, circuit judge of the Fifth Circuit, in Chaffraix vs. Schiff.

There never was any question or doubt expressed by this court, or by any other court, so far as we are advised, as to what was meant to be held in Bigelow vs. Forrest, 9 Wall. 339, until the decision of Wallack vs. Van Riswick, 92 U. S. 202, was rendered.

The explanation of this decision in the latter case is certainly not adverse to our case after Windsor vs. McVeigh, 93 U. S. 283.

Burbank vs. Conrad, 96 U. S. 279.

Kirk vs. Lynd, 106 U. S. 315.

Waples vs. Hays, 108 U. S. 6.

In Louisiana law an estate for life, or a life estate is called an usufruct, and the remainder is called the naked ownership,

and must always reside in some known person, who can control the use of it while he lives, or sell it, and whose heirs can inherit when he dies.

If by the forfeiture, under the act of 1862, which was "a kind of alienation" (Wallack vs. Van Riswick), it was intended that the purchaser did not get "technically a life estate," an usufruct, then he got some kind of an estate in lands for the life of another, which is utterly unknown to Louisiana law.

Entails of every kind are prohibited in Louisiana, trusts are forbidden, substitutions are forbidden, and the simplicity of landed tenures in Louisiana is proverbial.

The policy of the law is to keep real property in commerce. It must have some *owner in præsenti*, no matter who has the usufruct, use or habitation of it during the owner's life.

So that if this estate acquired by the purchaser was not really an estate for the life of another, an usufruct simply, then we have the absurd conclusion that *lands* situated in Lousiana, litigated between certain *citizens* of Louisiana, in a court professing to administer *Louisiana law*, are to be held, construed, and disposed of by a system of tenure utterly foreign and unknown to the jurisprudence of that state.

If the title to these lands, confiscated under the act of July 17, 1862, is to descend to the heirs by inheritance under the *lex rei sitæ*, upon the death of the owner, as solemnly declared by the court after grave deliberation in the last two cases arising under that act, then it follows that the intention of Congress supposed to exist a quarter of a century ago can cut no figure now in shielding heirs from the effect of honorable, real and valid obligations of their father, which have enured to the heirs' benefit, and to which, in equity, and under the laws of the state, they are bound to respond.

Shield vs. Shiff, 124 U. S. 351.

We have no quarrel with Wallack vs. Van Riswick, or with any of the cases which are modeled upon it.

We have shown above that we distinguish our case from it, and that the doctrines once erroneously supposed to rest upon that case have now fallen into "innocuous desuetude."

II.

It is very clear that the defendants in error are not claiming, as "forced heirs," any rights upon the property in question. The doctrine of forced heirs in Louisiana is set forth in the Civil Code under the title, "Donations and Testaments," under the subheading, "Of the Disposable Portion and the Legitime."

The ancestor can not give or bequeath an amount of property which exceeds a certain proportion of his whole estate, which is to be determined at his death by the number of the forced heirs, and the amount of his estate. Up to this legitime, reserved from the absolute power of disposition by the law, for reasons of public policy, a man can dispose gratuitously of all his estate, in spite of the forced heirs.

The case at bar is a case of a commutative contract, made with the ancestor, and both he and his heirs have received the benefit of it; "they have their reward."

The averments of the petition do not make any case of the rights of forced heirs; in fact, it is not stated in the petition whether they claim as heirs at all, or merely as purchasers.

They did not aver whether or not their father had ever alienated the interest in the land which they sought to recover (except in the confiscation proceedings), whether, if he did otherwise attempt to alienate, he was under any disability or incapacity at the time; they did not ask that his conveyance, if made, be held no bar to their recovery; they did not aver that the defendant in possession, or any one above him, had ever recognized them as ultimate owners, or that they (defendants in error), had ever done any acts of ownership in or upon the land, or had ever had their rights recognized as such in any way.

In short, they did not set forth on the face of the petition "a title better than all the world," which is a *sine qua non* in an action of ejectment.

They simply said: "Here is the land; here is its history so far as we have cared to trace it; here are the valuable improvements upon it, and here we are to take it all."

"How do you take?" we ask. "What is the basis of your right, in positive law, in public policy, or in ethics?" For every possible case must be decided upon one of these grounds. They answer, "we decline to say how we take, or why we take. We simply take." That is to say, they would take by violence.

III.

The defendants in error accepted the succession of Bosworth "under benefit of inventory" in their declaration, with the apparent idea that it would appear to the federal courts that this *shibboleth* in Louisiana law in some way changed the heir's position with respect to the ancestor's obligations; that the heir's obligation for his ancestor's debts was in some way extinguished or abolished in virtue of the use of this formula.

The benefit of inventory is simply a privilege given to the heir of holding his right and obligation in suspense, and of limiting the extent of his acceptance of the succession to the actual property found in it. He accepts simply to the extent that the property will pay the debts, and has a period of time for deliberating upon the affairs of the succession, called the delay for deliberating, *spatium deliberandi*. This is the doctrine of the old Roman law that has come down to us through the French, and was an institution of the praetor, the Roman chancellor, to prevent heirs from being ruined by the uncertainty of the status of their patrimony. It is provided in our code that no suit can be brought against the heir while he is deliberating; but at the end of the period allowed by law for deliberating, he can be compelled, by creditors, to say whether he accepts or renounces the succession. The acceptance, under benefit of inventory, is, of course, thorough-going, *as far as it goes*.

If you claim, and include within your benefit of inventory, the price paid your ancestor for a piece of land, or the equivalent of that price, you can not bring suit to recover the land also. The inventory of the succession can not embrace both the land and the price of it, or the results of the price of it

"Succession," says our code (article 871), "is the transmission of the rights and obligations of the deceased to his heirs." Or objectively "the estates, rights, and charges which a person leaves after death, whether the property exceeds the charges, or whether the charges exceed the property, or whether he has only left charges without any property." Right and obligation are correllative terms, inseparable in law, and in thought.

If the heir accepts under benefit of inventory, his right and his obligation as a simple heir are both in suspense. He has time, after having the inventory taken, to deliberate upon the matter, and he can, even as beneficiary heir, be appointed administrator to care for the succession, to manage it personally, in preference even to a creditor. He can, as a "forced heir," attack the ancestor's donations or bequests made in fraud of the legitime or simulated contracts, but that is the extent of the beneficiary heir's great privileges. Moore vs. Wartell, 39 La. An. Rep. 1067. Indeed it may be confidently asserted, there is not a case in the courts of Louisiana or France where the beneficiary heir ever brought such a suit as this. The only cases at all resembling it are the cases of Wade vs. French, 102 U. S. 132, and Wallack vs. Van Riswick, 92 U. S. 201, where we have already shown the ancestor was under incapacity to deal with the land confiscated for reasons of public policy.

Suppose instead of this suit being brought by Bosworth's heirs, it were brought by some third person, and these plaintiffs in error were to call them in warranty to defend, would they not set up their exception, "we have only accepted under benefit of inventory, and our obligation as heirs is therefore yet in suspense." State vs. Leckie's Heirs.

The beneficiary heir not yet having accepted the succession, not representing the *persona* of the deceased, not seeking to set aside acts done in fraud of the legitime of the forced heir, sets forth no capacity to stand in judgment for the succession on the face of the petition.

IV.

The plea of prescription of ten years *acquirendi causa* in

support of the right and title of plaintiff in error as owner is involved in the third assignment of error.

Prescription is one of the nine different ways of acquiring a right of property in *things* under the civil law. It is not the statute of limitations exactly, but the Roman doctrine *usucaption*. The doctrine of prescription is not founded solely upon the *laches* of the supposed proprietor, but is based rather upon reasons of public policy.

"En réalité," says Laurent, "la prescription est une déchéance, et c'est encore l'intérêt social qui la justifie. Si les droits étaient éternels, le monde ne serait qu'une immense procès, puisqu'on pourrait réclamer des droits nés il y a six mille ans, et personne ne serait a l'abri de pareilles réclamations. La paix et la sécurité sont une condition d'existence pour la société; dès lors les droits *doivent s'eteindre* après un long laps de temps.

"La société a plus qu'un intérêt, elle peut opposer son droit a celui du propriétaire."

Prof. Mourlon says:

"La prescription est donc injuste quelquefois. Mais l'intérêt général, auquel l'intérêt particulier est toujours subordonné, exigeait impérieusement que l'on fixât un terme, après lequel il ne fût plus permis d'inquiéter les possesseurs, de rechercher des droits trop longtemps négligés. Autrement, on eût, sous prétexte d'équité, donné ouverture à une infinité de contestations, rendu la propriété incertaine; tout eut été mise en question, et les droits les plus légitimes eussent été compromis. Une institution n'est pas odieuse parce qu'elle peut, dans certains cas, causer quelque mal particulier. Quelle est la règle générale qui n'est sujette à quelques inconvénients? Si, vous plaçant à un point de vue élevé, vous considérez combien la prescription est utile et le bien qu'elle procure, vous ne serez pas étonné qu'on l'ait appelée *patrona generis humani*."

Prescription *acquirendi causa* therefore rests upon the same foundation as the law of Eminent Domain.

In this view the Civil Code says, obligations are *extinguished* by prescription, and rights of property *acquired* by it.

To make the plea of prescription of ten years *acquirendi causa* available in the law of Louisiana, there are four requisites:

1. Good faith on the part of the possessor.

2. A title which shall be legal on its face, and sufficient to transfer the property.

3. Possession during the time required by law.

4. And finally, an object which may be acquired by prescription.

We have all these requisites in the case at bar.

A. We acquired in *good faith* from A.W. Bosworth, on Sept 23, 1871. There is nothing in this record to show that Edgar, to whom Bosworth conveyed, knew anything at the time about the confiscation proceedings, or had any knowledge at that time of any pretended outstanding claim on the part of any body in the world, *in posse* or *in esse*. Article 3480, Civil Code, provides: "Good faith is *always presumed in matters of prescription;* and he who alleges bad faith in the possessor must prove it;" and Article 3481 provides, "it is sufficient if the possession has *commenced* in good faith."

So far as the record shows Edgar never discovered that any one in the world had any claim in or upon the land until after he had acquired title from Bosworth as owner, and had in turn conveyed that title *as owner*, with full warranty, to the New Orleans, Jackson and Great Northern Railroad Company.

B. We acquired a title in regular form by act before a notary public, and for a real price, a valid consideration, which was paid to the vendor, who purported in the act of sale to be the *owner*, and to *convey* his title as owner to the purchaser. We acquired a *just title*. Article 3484 of the code says: "By the term *just title* in cases of prescription we do not understand that which the possessor *may have derived from the true owner*, for then no true prescription would be necessary, but a title which the possessor may have received from any person

whom he has honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property."

It has been accordingly decided in Louisiana that if the defect is *dehors* the act conveying title, the possessor is in good faith and acquires title by prescription.

Hall *et al.* vs. Mooring, 27 An. 596.

Barrow vs. Wilson, 38 An. 209.

Giddens vs. Mobely, 37 An. 417.

Pattison vs. Maloney, 38 An. 885.

C. We have confessedly had continuous, actual, exclusive and public possession of the land for more than ten years, and have made many valuable improvements on it as owner.

Our possession was never interrupted by any adverse claim by these defendants in error, or any one else in the world, until our title by prescription was perfect. We were never disturbed as owners until this suit was brought.

D. Is the nature of the *res* susceptible of its acquisition by prescription? What is the *res?* Confessedly, it is *real property.*

Against whom are we claiming it by prescription? *The Sovereign, the United States Government, the State?* No. Do we claim against any one *standing in their shoes,* "ayant cause," as the French law expresses it, any *grantee* of the Sovereign, or any *grantee* of the State? Are we claiming the benefit of prescription against any one who was under disability, or *powerless* to assert their rights during the time of our possession? Against any minor, or interdicted person, or any one who could invoke the maxim "*contra non valentem non currit prescriptio?*" It doth not so appear in the record. We are simply claiming prescription as against *the heirs of the man from whom we acquired* title, which heirs confessedly can not set up any other title than title by *succession.*

They "have their rights" not from the government under the confiscation act, but from the ancestor, under the *lex rei sitæ*, by inheritance. Of course, if we derived title from the *purchaser at confiscation sale*, or from any one claiming title directly under him, then we could not claim that we have here the benefit of a *just title, good faith,* or a *thing susceptible*

of ownership by prescription. But here we lay no claim whatever to the rights of purchaser at confiscation sale; we claim from a higher source, from the same source as the heirs themselves, and our title is *prior and paramount* to theirs.

The heirs are barred by the plea of prescription *acquirendi causa* from asserting title in the face of the ancestor's conveyance, made for valuable consideration more than ten years before they brought suit, for much more apparent reasons than they were estopped in the case of Shields vs. Shiff, 124 U S. 351, by the mere failure of the ancestor to plead prescription *liberandi causa* on a prescribed debt and a dead mortgage.

Does the fact that A. W. Bosworth's undivided interest in the property really was confiscated and sold by the United States to a purchaser in 1865 affect the very *res* itself, its very physical status, so that it could not be thereafter the object of a title by prescription?

We apprehend not. The question before the court here is the application of a statute founded upon the *public policy of the state* in a contest between citizens of the state, in a court bound to enforce state laws, and where neither party sets up any title under the confiscation act. So the construction of the Federal statutes is left entirely out, in the discussion of this plea, the very moment it is announced by the Supreme Court of the United States, in two Louisiana cases, that "they (the act of July 17, 1862, and the joint resolution explanatory) make no disposition of the property confiscated *after the death of the owner*, but *leave* it to devolve to the heirs according to the *lex rei sitæ*, and that those heirs take *qua* heirs, and not by donation from the generosity of the Government."

Avegno vs. Schmidt, 113 U. S. 291.

Shields vs Shiff, 124 U. S. 351.

Whatever the intention of Congress when the confiscation act was passed it can not be invoked *now* to defeat the existing public policy of the State of Louisiana, and wrest real property situated within her territory, subject to her laws, from its lawful owners, whose tenure of the land is founded upon, and was acquired by them, by virtue of the very statutes of *public policy* of the state herself.

Indeed, if our plea of prescription is bad in law, then it follows that these plaintiffs in error could not have acquired title to the land in question, even by regular condemnation proceedings under the law of *Eminent Domain*, for public purposes, to-wit, the necessities of a railroad. Since there was no *owner* if Bosworth was not owner, against whom it could have proceeded, and averred in its petition, as a condition precedent to condemnation that they could not *agree with the owner* upon the price. By the very necessities of public policy Bosworth must have been the *owner;* since *nemo est haeres viventis*, and the code especially forbids the sale of the succession of a living person. C. C. art. 2454; C. C. 1600.

The real fact is that unless there were some contest between a purchaser, claiming title under the confiscation act, or his assigns, and these heirs, there could be *no federal question*, and there is none properly in this view of the case, as we have shown.

V.

We now take up the question of the improvements put by the Illinois Central Railroad Company, lessee, upon the land, between July 20, 1882, and October 11, 1885, admitted to be $2500 in value. Rec., p. 17.

The Circuit Court held that these improvements all enured to the benefit of the defendants in error, by right of accession simply—that this innocent lessee was in technical *bad faith* and ought to have known that its lessor had no title to the land, though defendants in error were never kind enough to notify the lessee of such fact.

It cited in support of this view two Louisiana cases, which are not in point, and some articles of the Civil Code which do not apply. C. C. Art. 569; Brugère vs. Slidell, 27 An. 70; Pendegast vs. Schwartz, 30 An. 590.

The cases cited by the Circuit Court were cases where the *purchaser at confiscation sale*, who knew what he was buying, claimed the benefit of his improvements on the land, and is one of the cases of improvements put on the land *after* the ejectment suit had been brought against him. Brugère vs. Slidell, 27 An. 70.

This lessee in the case at bar was clearly in good faith, no

matter whether its lessor was or not, and these defendants in error were themselves in *bad* faith, in lying quietly by, in allowing this innocent lessee to spend this money, when they could have put the lessee on its guard, by simply saying, "we warn you."

It is bad enough faith for them to attempt to dishonor their honorable father's conveyance, of which *they* have received the benefit, but to lie quietly by with presumably full knowledge of their pretended rights, and allow this innocent lessee to build $2500 worth of sheds, platforms, railroad tracks and other superstructures, necessary to the railroad business, but not necessary to the business of defendants in error, and then claim it all, shows such a disregard for the legal and equitable rights of others that a just man must say, at least: "*Haud equidem invideo, miror magis.*"

The articles of the civil code upon which we rely are the following: Art. 1048 Art. 2726 (Appendix p 47)

Even in the extreme case of French vs. Wade, 102 U. S. 132, this court intimated that it would have given French the benefit of the improvements had the amount of them been fixed. So also in Borland's case, 4 Mason, 174. Mr. Justice Story held that a purchaser of a *defective title* at a sale made by the commonwealth in confication proceedings was a purchaser in good faith and entitled to his improvements.

This court, so far as we are advised, has never denied that doctrine.

The confiscation act itself declared that the courts should have power to vest "*good and valid titles*" in the purchasers.

Is it possible that the government, by the saving contained in the joint resolution, intended to *punish* purchasers under the act by holding that they not only got defective titles, but were in bad faith besides?

The defendants in error actually claimed *rent* from the plaintiff, from the death of Bosworth down to the date of the suit, at $500 per month, and this claim was merely dismissed by voluntary non-suit.

It does not appear, therefore, that they even intended to allow us to set off that portion of the rent claimed, by the value of improvements placed on the land during that period, or even give the lessee the right to remove such improvements.

So that the whole theory of the defendants in error, of their *right* to recover anything at all in this suit, is an utter legal heresy, and is unjust in a moral point of view. They have no rights here, because they have already gotten and enjoyed those rights, and it is the very acme of impudence to demand them again.

This court will give us the justice and equity which we crave, and sustain us in defense of our vested rights of property.

It is therefore respectfully submitted that the decree of the Circuit Court is wholly erroneous, that the reasons for it are "*jejune and unsatisfactory*," and that it must be reversed.

All of which is humbly and respectfully submitted.

GIRAULT FARRAR,
THOS. J. SEMMES,
JAMES FENTRESS.
Of Counsel for Plaintiffs in Error.

APPENDIX.

EXTRACTS FROM THE CIVIL CODE OF LOUISIANA.

Of Successions.

Article 871 [867]. Succession is the transmission of the rights and obligations of the deceased to the heirs. 12 R. 105; 2 A. 405; 18 A. 285; 19 A. 75; 22 A. 517. Taylor's Elements of Civil Law, p. 519.

Art. 872 [868]. Succession signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property. 12 R. 105; 1 A. 35; 21 A. 604, 606; 17 A. 306.

Art. 874 [870]. Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be. 12 R. 105.

Art. 881 [877]. Heirs are divided into two classes, according to the manner in which they accept successions left to them, to wit: unconditional and beneficiary heirs.

Art. 883 [879]. Beneficiary heirs are those who have accepted the succession under the benefit of an inventory regularly made. 12 A. 610; 36 A. 299.

Art. 885 [881]. The law does not take into consideration the origin nor the nature of the property in order to regulate the succession. C. C. 998 (904), 999 (905), 1753 (1746); C. N. 732; 7 N. S. 665; 17 L. 312; 10 A. 679.

Of the Benefit of Inventory and the Delays for Deliberating.

Art. 1032 [1025]. The benefit of inventory is the privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed.

C. C. 1054 (1047), 1423 (1372); C. N. 793.

Art. 1033 [1026]. By term for deliberating is understood the time given to the beneficiary heir, to examine if it be for his interest to accept or reject the succession which has fallen to him. C. C. 977 (970); C. P. 974; 12 A. 610; 17 A. 38.

Art. 1050 [1043]. The term given to the beneficiary heir to deliberate whether he will accept or reject the succession shall be thirty days from the day on which the inventory is finished.

Art. 1052 [1045]. During the term for deliberating, the beneficiary heir can not be compelled to assume the quality of heir, nor can any judgment be rendered against him.

C. N. 798; C. P. 977, 978; 14 A. 651.

Art. 1053 (1046). Nevertheless, the creditors of the deceasd may institute their suits against the administrator of the succession; but on the exception being made by the administrator, that the beneficiary heir is within the time for deliberating, the proceedings shall be stayed until the expiration of the term, and until the heir has decided.

C. P. 65, 66, 734, 735; 2 L. 299; 2 A. 575.

Acts 1828, p. 156, § 15.

Art. 1055 (1048). At the expiration of the term for deliberating, the creditors and legatees of the succession can compel the heir to decide whether he accepts or rejects the succession, and they shall present a petition to this effect to the judge of the place where the succession is opened, who shall cause the beneficiary heir to be cited to answer thereto.

C. N. 798, 800; C. P. 996, 997, 982, 1071.

14 A. 1; 20 A. 124.

Art. 1061 [1054]. If the heir secrete anything belonging to the succession, or has knowingly and in bad faith failed to include in the inventory any of the effects of the succession, he is deprived of the benefit of inventory.

C. N. 801; C. P. 978; 4 L. 485.

Of Donations and Testaments.

Of the Disposable Portion and the Legitime.

Article 1493 [1480.] Donations *inter vivos* or *mortis causa* can not exceed two thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number.

Under the name of *children* are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent.

Art. 1494 [1481]. Donations *inter vivos* or *mortis causa* can not exceed two thirds of the property, if the disposer, having no children, leave a father or mother, or both.

Art. 1495 [1482]. In the cases prescribed by the two last preceding articles, the heirs are called *forced heirs*, because the donor can not deprive them of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them.

Note.—It may be stated here that the father could not disinherit a son in Louisiana under the code (Articles 1,620, 1,621) for taking the side of the Federal Government against the rebellion, or for refusing to give aid and countenance to the rebellion.

Of Prescription.

Art. 3457 [3420]. *Prescription* is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law.

Art. 3474 [3437]. Immovables are prescribed for by ten years when the possessor has been in good faith, and help by a just title during that time.

Art. 3479 [3445]. To acquire the ownership of immovables by the species of prescription which forms the subject of the present paragraph, four conditions must concur:

1. Good faith on the part of the possessor.
2. A title which shall be legal and sufficient to transfer the property.
3. Possession during the time required by law, which pos-

session must be accompanied by the incidents hereafter required.

4. And finally, an object which may be acquired by prescription.

Art. 3481 [3447]. Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor must prove it.

C. N. 2268; 12 A. 242; 14 A. 362, 363.

Art. 3482 [3448]. It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription.

C. C. 3479; C. N. 2269; 3 A. 8; 12 A. 242.

Art. 3483 [3449]. To be able to acquire by the species of prescription mentioned in this paragraph a legal and transferable title of ownership in the possessor is necessary; this is what is called in law a just title.

C. C. 3479; 4 L. 112; 15 L. 566; 14 A. 230.

Art. 3484 [3450]. By the term *just title*, in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary,, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property.

Art. 3485 [3451]. And in this case, by the phrase, *transfer the ownership of the property*, we understand not such a title as shall have really transferred the ownership of the property, but a title which, by its nature, would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owners, such as a sale exchange, legacy, or donation.

Thus, prescription could not be acquired under a title resulting from a lease or loan, because these contracts do not transfer the ownership of the property.

Art. 3493 [3459]. The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by universal or particular, a lucrative or an onerous title.

Of the Rights of Possessors in Good Faith.

Art. 508 [500]. When plantations, constructions, and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this person to take away or demolish the same. If the owner require the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation. Such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.

If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

Nevertheless, if the plantations, edifices, or works have been made by a third person, evicted, but not sentenced to make restoration of the fruits, because such person possessed *bona fide*, the owner shall not have the right to demand the demolition of the works, plantations, or edifices, but he shall have his choice, either to reimburse the value of the materials and the price of the workmanship, or to reimburse a sum equal to the enhanced value of the soil.

Art. 2726 [2697]. The lessee has a right to remove the improvements and additions which he has made to the thing let, *provided*, he leaves it in the state in which he received it.

But if these additions be made with lime and cement, the lessor may retain them on paying a fair price.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 79.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

vs.

MILLARD BOSWORTH AND CHARLES H. BOSWORTH.

ARGUMENT OF JAMES FENTRESS, OF COUNSEL FOR PLAINTIFF IN ERROR.

I.

CHRONOLOGICAL STATEMENT OF THE MATERIAL FACTS IN THIS CASE.

a. In 1860, Abel W. Bosworth, father of defendants in error, owned one-sixth undivided interest in the land in controversy, in fee simple.

b. On January 20, 1865, proceedings were begun for its confiscation, the said Bosworth being a rebel.

c. In March, 1865, a sale thereof, so far as the Confiscation Act of July 17, 1862, and the joint resolution of same day authorized, was made, and at such confiscation sale E. W. Burbank became the purchaser.—Record, page 15.

d. On October 2, 1865, said A. W. Bosworth, the rebel aforesaid, was pardoned by the President of the United States by a special pardon.—Record, pages 17 and 18.

e. On December 25, 1868, the President issued a general amnesty proclamation.—Record, page 17.

f. On September 23, 1871, the said A. W. Bosworth, six years after his pardon was in force, sold and transferred with full warranty said land to S. H. Edgar.

g. On December 18, 1872, Burbank, the purchaser at said confiscation sale, also sold and transferred all his interest and claim to S. H. Edgar.

h. Edgar sold and transferred, with full warranty, the property in controversy to the New Orleans, Jackson and Great Northern Railroad Company.—Record, page 16.

i. The last mentioned railroad company covered said property by a mortgage, made in 1872.—Record, pages 8 and 9.

j. In a suit to foreclose said mortgage in 1876–7, the Circuit Court

of U. S., took possession of said property by a receiver, and it was sold under foreclosure of said mortgage in 1877, to certain persons, who in turn sold it to a new railroad company, and the Chicago, St. Louis & New Orleans Railroad Company, one of the defendants in error, acquired it from the last purchaser above mentioned.—Record, pages 8, 9 and 16.

All of these sales and purchases were long *after* the war had ended—*after* the special pardon was granted—*after* the general amnesty—and each deed, evidencing each sale, was duly recorded about the date of its execution, and each deed was for a valuable consideration, and the property from 1871–2, when the purchaser at confiscation sale and the original owner, who had long before that been pardoned, had each conveyed the same to Edgar, has been in the adverse possession and use of the successive purchasers, each claiming the same openly in fee simple, under duly recorded conveyances.

k. In 1885, A. W. Bosworth died intestate, and defendants in error have accepted his succession, with benefit of inventory, and now claim in this suit that upon the death of their father they become the owners in fee simple of the property in controversy, notwithstanding his pardon and his subsequent sale with full warranty.

1. An examination of the Act of July 17, 1862, commonly known as the "Confiscation Act"—and the joint resolution of same date—so far as they effect the real estate of rebels, situate in other than what are termed "loyal states," will demonstrate the truth of the assertion—that whatever interest of the rebel is subject to seizure may be condemned and sold in a proceeding *in rem* therein authorized.

It is also clear that in the seizure and condemnation in this case, whatever was seized was condemned, and what was condemned was sold to Burbank, the purchaser at condemnation sale.

The *Venditioni exponas* ordered the sale of "all the right, title, "and interest of A. W. Bosworth in and to the one undivided third "of said property," and the sale and deed to Burbank was likewise explicit.—Record, pages 15 and 16, and pages 1 and 2.

The Act itself did not contemplate a partial sale, or a sale of part of the right of the rebel in the interest or estate which had been seized. And the seizure, condemnation and sale in this case settle precisely that what was seized was condemned, and what was condemned was sold.

There is no room for controversy as to this fact.

We are not now concerned with the question of whether the fee simple title was seized, condemned, or sold. Nor whether it could, under the constitutional provision, or the joint resolution, be so seized, condemned and sold, nor whether, as Bosworth only owned an undivided one-sixth interest in a lot, probably incapable of partition in kind, the land or any part of it was seized. Nor whether the fee was in the Rebel or the United States, or in abeyance or somewhere else; but simply with this question, to wit: Was there any right, title, or interest of Bosworth, the rebel, in or to the undivided one sixth of this land in controversy seized or condemned *that was not sold?*

The answer to this question is explicit. The bill or petition in this case, on page 1 of the Record, says: "The Government of the "United States did," in accordance with the provisions of the said Confiscation Act, seize, condemn and sell * * * "all the right, "title and interest of the said A. W. Bosworth, consisting of one "undivided sixth part in and to the following described property."

In the agreed statement of facts, Record, pages 15 and 16, it is explicitly stated that "the said property was seized by the proper "officer of the United States," * * and that "a libel of information "was filed against the said property," and that an order for the sale of "*said property*" was issued, and that "at said sale all the right,

"title and interest of A. W. Bosworth in and to the one undivided "third of *said property*" * * * "was adjudicated" to Burbank, the purchaser, "and the marshal executed a deed in due form of "law to said Burbank for the same."

We have, therefore, in the record the explicit statement that the "said property" was seized—the "said property" was libeled—the "said property" was sold.

There is not an intimation in the whole record that the sale did not comprehend *all* that was seized.

The same words which declare what was seized declare also what was condemned and what was sold. There was nothing left in the hands of the libelant, the marshal or the United States, except the price paid for what was seized, and the purchaser at the confiscation sale got precisely what was seized and condemned and sold—no more, no less.

The record in this case makes it certain therefore that what was seized was *all* sold—no part of the interest seized—no part of the interest condemned—was left unsold.

It follows therefore that if the fee in said land was seized, or condemned, it was sold. In short, that everything that was divested out of Bosworth, the rebel, by the said seizure, condemnation or sale, was vested in the purchaser at said sale.

Over seven years after this seizure, condemnation and sale, a railroad company, owning the other undivided five-sixths of this property and needing it for terminal purposes, bought all that Burbank the purchaser at confiscation sale had acquired.—Record, page 16.

II.

There is another striking feature of the Confiscation Act, which is expressed in these words: "And all sales, transfers or convey- "ances of any such property after the expiration of the said sixty

"days from the date of such warning and proclamation shall be "null and void."

In addition, therefore, to the right of the Government to seize, condemn and sell whatever of the right, title or interest of the rebel in real estate in disloyal states, which the acts and the joint resolution aforesaid may allow, we find a personal disability is placed on the rebel also, to wit: that he cannot make a valid sale of his property.

We are not now concerned with the questions of whether this disability takes effect at once after the expiration of sixty days from the date of the proclamation, nor whether it is confined in its operation to such property as the Government may thereafter seize and condemn. Nor whether such disability is limited to the continuance of the rebellion, which the Act was intended to aid in suppressing. Nor whether the disability is personal to the offender, so that it would apply to all the property he might own while a rebel, or simply to such as was seized by the Government. Nor whether the disability would continue after the war closed, or after he ceased to be a rebel, or was pardoned.

But simply the fact that here is a disability imposed upon the rebel's power of disposition.

III.

The third feature of the Act is that the President may grant pardon and amnesty, at such time and with such exceptions and upon such conditions as he may deem expedient for the public welfare.

These three are the main features of the Act, and the reason for each is apparent.

The right to seize, condemn and sell the life interest which a rebel had in property, would deter some from becoming rebels, and the money realized by its sale would aid in furnishing the

means to suppress the rebellion, and at the same time deprive the rebel to that extent, of the power to aid financially.

The disability imposed would prevent the rebel from covering up or obscuring his interest or the title to the property by sales, secret or open. Would thus avoid long legal contests by the Government or the purchaser at the Government sale of such property with parties claiming title, possession or encumbrance by reason of deeds of the rebel.

This was of consequence for two reasons, it would expedite seizures and sales, and would increase the price which a purchaser would bid at such sales.

This disability as to property seized by the Government also might be held to paralyze the rebel, so that he cannot by sale of the fee, or the estate, beginning at his death and extending thence forward, raise money for the support of himself or the rebellion.

Thus the provisions of the Constitution, and of the joint resolution, which latter is as follows, "nor shall any punishment or "proceedings under said Act be so construed as to work a forfeiture "of the real estate of the offender beyond his natural life," would be considered and yet the rebel be powerless.

This plain going over the provisions of the Act and the joint resolution show that the *results* reached in all the cases may be held to be consistent with each other, as well as with the Act and joint resolution.

That is to say, that the seizure or sale covered nothing beyond the life of the rebel, so that there still remained in the rebel, that part of the fee, which extends from the date when he should afterward die, forward for ever; but as to this remainder of the fee, the rebel was disabled by the prohibitions of the Act from conveying out of himself or encumbering.

There is no other theory consistent with the Act and joint resolution, upon which the results reached in the cases decided thereunder can be reconciled.

IV.

This conclusion is manifest, when we examine the cases, and see what insuperable difficulties, any other theory of reconciling the results in each of the cases involves.

For instance the theory, that something was seized which was not sold, or that the part of the fee represented by the estate from future death of rebel forever, was divested out of the rebel. The question is in such case, where did it go? If we say, it became the property of the United States, we are met with two insuperable difficulties. 1st. The joint resolution expressly declares that no "punishment or *proceedings under said* Act" shall be "so con-"strued as to work a forfeiture of the real estate of the offender "beyond his natural life." 2d. If that part of the estate in fee which is measured from the death of the rebel forwards, is divested out of him by the seizure under the Act, then there is nothing for his heirs to inherit, and they could not claim as heirs for the ancestor was seized of nothing at his death, indeed, on this theory had no right, title, claim or interest in or to the land, and as the heirs' claim is worked out through the ancestor and founded alone on his estate and rights, if the ancestor had no interest, present or prospective, the heir as such must fail of recovery.

If the title to such remainder of an estate in fee is supposed to be vested on seizure under the Act, in the United States, the heir of the rebel as such has no claim upon it, and it would require a general or special Act of Congress to divest it out of the United States and vest it in the heirs of the rebel, and there is no such Act.

If, on the other hand, this estate in the land, from the death of the rebel forwards, was properly seizable under the Act and was so seized and condemned and sold. Then the purchaser at condemnation sale got a full title in fee, and there is nothing left for the heir of the rebel to inherit or claim.

In short, whether we try this matter as to the estate of the rebel from the time of his future death forwards, by the act and joint resolution, or by the results reached in the cases decided, the fee, or to be accurate, that part of the fee beyond the rebel's natural life, is never touched.

The joint resolution prohibits the extension of any punishment or proceedings under the Acts beyond the natural life of the rebel. The Act makes no provision for the heir, and if the seizure divests this remainder of the fee out of the rebel owner, and vests it in the United States, or dissipates it into non-existence, it is not only extending the Act and its punishments and proceedings under it "beyond the natural life" of the offender, but it is practically cutting off the heir from any claim to it, for his claim as heir of necessity if founded on, grows out of the siezin right, title or interest of the ancestor, and is impossible without such siezin or right in the ancestor.

Whatever may be said of the usufruct, the life estate, the property or its use during the life of the rebel, even though the war lasted up to his death, and he continued to be a rebel as long as he lived, it is certain that no theory as to that part of the fee, which extends beyond the rebel's natural life, can be reconciled with the Act and joint resolution, nor with the results reached in the cases, except the theory that such remainder was not subject to seizure, nor condemnation, nor sale, but remained where it was at the time of seizure of the life estate—vested in the rebel.

V.

Nor can the further fact be escaped, to wit, that anything under said Act and joint resolution which impairs the natural right of the owner of the fee to encumber or sell that part of said fee simple, which shall extend beyond his natural life, must be found alone in

that provision of the Act which attempts to disable him from alienating or encumbering his property.

If the disability cannot be found in that provision, then it is certain it has no existence at all.

In the case of a rebel who is the owner in fee simple of land—that part of this estate in fee during his natural life, whether called the estate for life or what not, may be separated in thought, and is often by the act of the owner carved out of the fee; and it is at this point that the joint resolution draws the line.

The owner in fee has not only that estate which may be used and enjoyed during his natural life, but also that which represents the title and use beyond his natural life.

The joint resolution expressly saves this latter from the operation of the Act, and declares it shall not be forfeited.

If it was vested in the rebel at the time the Government began proceedings, and if it also be true that no "punishment or proceedings under said Act" shall "be so construed as to work a forfeiture "of the real estate of the offender beyond his natural life," then it follows that so far as said Act is concerned, or any punishment or proceedings under it, this estate still resides in the rebel.

It is entirely unaffected by the seizure, condemnation and sale, and his right to dispose of it is clear, unless the clause of the Act disabling him from selling, transferring or conveying his property paralyzes his right of disposition.

VI.

Now this part of the fee, to wit, that extending beyond the natural life of Bosworth the rebel, is the only matter in controversy here. So far as the life estate, or the estate during life, is concerned—the estate as to which all the seizure, condemnation and sale proceedings were had—there is no controversy. It was proper

for the United States to protect Burbank, the purchaser at its confiscation sale, in the use, possession and enjoyment of whatever she had seized under said Act and sold him, and she has done so. No one controverts or complains of this. Burbank, the purchaser at confiscation sale in 1865 paid seventeen hundred dollars for what he bought, and after holding it until December, 1872, he sold it for five thousand and one hundred dollars.—Record, pages 15 and 16.

His right to the possession of what he bought was maintained, and he sold what he bought for *three times* as much as he gave for it.

We have no disposition to discuss *what* he bought at confiscation sale, nor to quarrel with the cases which hold that all that could be confiscated or sold terminated at the death of the rebel.

There is not, in this case, any controversy with the confiscation suit, or the purchaser, or the thing purchased. If what was siezed and sold ended with the natural life of the rebel, it is passed. If it extended beyond his natural life, the plaintiff in error owns it by purchase, from the purchaser at said confiscation sale.

The controversy here is as to who owns that part of this undivided one-sixth interest in said land beyond the natural life of A. W. Bosworth.

VII.

We have shown above that all that was seized in the condemnation proceedings was sold to Burbank, and that we now own, by purchase, all that was so sold.

So now, without discussing whether what was sold extended beyond the life of Bosworth, we proceed to show that whether it did or not we own this one undivided sixth in fee simple.

The fee simple was in A. W. Bosworth prior to confiscation proceedings.—Record, page 15.

His estate for and during his natural life was confiscated and

sold to Burbank as aforesaid. This left in Bosworth the fee. There was no seizure nor sale or "forfeiture of the estate of the "offender beyond his natural life." Indeed such forfeiture was expressly prohibited in the joint resolution.

Therefore this fee remained vested in Bosworth.

The only thing possible to claim as to this fee is that Bosworth was disabled from alienating it by reason of the provision of the Act heretofore quoted.

Was this disability removed by the ending of the war? The whole purpose of the Act is declared in the 5th section to be "to "insure the speedy termination of the present rebellion." The question is: When the rebellion was terminated was this disability to sell also terminated? Without stopping to answer this question we ask: Was this disability to sell property which Bosworth owned terminated when he ceased to be a rebel, when there was no rebellion, no rebels?

If we hold that the disability to sell property, still continued after the rebellion was ended and there were no rebels, then we reach the result, that the whole landed estates, situate in what was known as the Confederate states, were locked up for a generation, and all or nearly all the real estate transactions of millions of people for a whole generation are null and void, and that, too, in a time when there was profound peace.

But we will not stop to discuss this, either.

VIII.

On the 2d of October, 1865, A. W. Bosworth was granted a special pardon, which is set out in full on pages 17 and 18 of the Record. It recites that A. W. Bosworth, "by taking part in the "late rebellion against the Government of the United States, has "made himself liable to heavy pains and penalties." It then proceeds to "grant to the said A. W. Bosworth, a *full pardon* and

"amnesty for *all offenses* by him committed, arising from participa-
"tion, *direct or implied*, in the *said rebellion*, conditioned as fol-
"lows: 1st, that he shall take the oath; 2d, that he shall own no
"slaves; 3d, that the said A. W. Bosworth first pay all costs which
"may have accrued in any proceedings against his person or property
"before the date of the acceptance of this warrant." 4. That the
"said A. W. Bosworth shall not, by virtue of this warrant, claim
"any property or the proceeds of any property, that *has been sold* by
"the order, judgment or decree of a court under the *confiscation*
"laws of the United States," and 5th, that he shall notify the Sec-
retary of State of his acceptance.

The question is, what was the effect of this pardon?

Certainly it did not restore what had been sold to Burbank at confiscation sale. Any question as to that is settled by the fourth exception attached to the pardon, which provides that he shall not claim what "has been sold" under the confiscation laws. Nor did the pardon authorize him to demand of the United States the proceeds of said confiscation sale. This is also expressly excepted by the fourth condition of the pardon.

There is no claim that Bosworth, by reason of the pardon, could demand either what was sold or its proceeds.

But the estate, which extended beyond his natural life,—that part of the fee which was left after the confiscation sale of his estate for life,—that was not sold,—that was not forfeited. On the contrary, it was expressly provided by the terms of the joint resolution that no punishment or proceedings under said Act "shall "be so construed as to work a forfeiture of the real estate of the "offender beyond his natural life." The very worst that could be said as to the estate beyond his natural life, is, that as a punishment or otherwise, by the provision of the Act prohibiting a sale thereof by the rebel, he was disabled from alienating it.

And this disability was removed by the pardon.

If the pardon had any effect whatever, it removed this disability, and enabled Bosworth to dispose of the property which had not been sold.

He could have disposed of the estate beyond his natural life even while a rebel, if the disability imposed by the Act had not denied him this natural right of disposition of what he owned. And so, when he is granted a "full pardon and amnesty for all "offenses by him committed, arising from participation direct or im- "plied in the said rebellion," he is as fully restored to his right of disposition of what had not been sold under confiscation laws as if he had never been a rebel.

IX.

We have then, on October 2, 1865, the date of acceptance of the special pardon, this condition of things: A. W. Bosworth, whose estate in the property in controversy, beyond his natural life, had never been sold, alienated or forfeited, is still the owner thereof. His estate therein, during his natural life, had been sold under the confiscation laws to Burbank, and Burbank was enjoying his purchase without let or hindrance. The United States had the money which the purchaser at confiscation sale had paid for what was sold. And now the pardon comes and removes the punishment imposed, to wit, disability of the offender to sell the fee, with right of possession beginning at his death.

Bosworth is restored to his citizenship, to his right of disposition of whatever he owns. The war is ended, the rebellion suppressed. The Government encourages all its citizens to reconstruct a prosperous peace. Bosworth lives, observes the terms of his pardon, and more than six years of profound peace passes away. Then, on the 23d of September, 1871, A. W. Bosworth and his wife conclude to sell his estate in the land in controversy, and do sell the same for eleven thousand, six hundred and sixty-six dollars, sixty-six and two-

thirds cents ($11,666.66⅔), with full warranty, to one S. H. Edgar, who afterwards sells to the New Orleans, Jackson & Great Northern Railroad Company, in 1872.—Record, page 16.

The Railroad Company covers this property by a mortgage, on May 1, 1872. In 1876 a suit is brought, to foreclose the mortgage, in the Circuit Court of the United States, in New Orleans; the Court's receiver takes charge of this property, files a schedule showing all the property seized, notice of sale under the decree of said court is published daily for two months, referring to said inventory; the sale is made, the title decreed to purchasers, and from them passes by valid transfers until it becomes the property of plaintiffs in error.—Record, pages 8, 9 and 16.

Bosworth, the citizen, and his wife, have received the $11,666.66⅔ paid in 1871, and doubtless they and these defendants in error used and enjoyed so much of it as they needed, and the heirs will receive what is left of it.

It was sold for a full price, in a time of profound peace, and the father and mother make full warranty to the purchaser.

X.

If these sons can come now after twenty years, and in the face of the warranty of their father — a warranty made over six years after the war was closed and special pardon granted, twenty years after their parents received the money, the full price,—if they can come now as heirs, holding fast, it may be, the whole purchase price paid, and at the same time eject the purchaser and take the land also, it seems no more nor less than robbery under the forms of law. Take, as heirs, the money paid for the land, and then, as *heirs*, override the sale and warranty of father and mother, and take the land also as heirs. Such a result shocks the conscience, and would be a stench in the nostrils of common honesty.

Surely this cannot be done under the forms of law.

A. W. Bosworth, at the time he sold and warranted to Edgar, in 1871, was just as loyal, free and worthy a citizen as his sons are in 1885. There was no disability resting upon him. Yet, by some kind of legal legerdemain, it is claimed that his right to dispose of his property was forfeited; that his heir can claim and hold the money for which his father, who was a citizen and freeman, had sold it, and also, as heir, violate his father's warranty, and seize and hold the land also as heir. Claim under and against his father at the same time.

XI.

It is needless to cite authorities as to the general effect of a pardon. It is an act of grace, which has always been held sacred in civilized communities, always received a generous interpretation and construction; but we call attention to some cases decided by this Court as to the effect of a pardon of a rebel in the late war, as to property rights where confiscation proceedings had been enforced under the Act and joint resolution we have been discussing.

In the case of Osborn *vs.* United States, 91 U. S. 478, this Court held that the rebel was "restored by the pardon to his "rights in the proceeds of the property forfeited." *A fortiori*, would the pardon in this case restore the right of Bosworth to dispose of that part of his property which had not been forfeited?

In the case of Carlisle *vs.* the United States, 16 Wall, 151, this Court says: "It is true, the pardon and amnesty do not and "can not alter the fact that aid and comfort were given by the "claimants, but they forever close the eyes of the Court to the "perception of that fact as an element in its judgment, no rights "of third parties having intervened."

For a discussion of the various cases decided, I refer the Court to the brief filed for plaintiff in error in this case. The object of this argument is more particularly to discuss the Act and joint resolution, and to show that in them can be found no warrant for the claim of defendants in error in this case.

The atrocity of the results sought to be reached in this case, and the fact that I possibly can not be present to argue it orally, have moved me to the presentation of this printed argument.

JAMES FENTRESS,
of Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 79.

ILLINOIS CENTRAL RAILROAD COMPANY AND THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

versus

MILLARD BOSWORTH AND CHARLES H. BOSWORTH, DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

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SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

5th Assignment of Error.

The Circuit Court erred in holding that the Special Pardon of A. W. Bosworth, set up in the pleadings, and the General Amnesty Proclamation of December 25th, 1868, had not the effect of restoring to A. W. Bosworth the power of selling and disposing of the lots of ground in question after the termination of the life estate conveyed at the con-

fiscation sale, and of blotting out the offense committed by him and thereby enabling him to exercise all his rights as to said property, except in so far as the same had been conveyed to Burbank, the purchaser at said confiscation sale, and investing him with power to bind his heirs by any warranty in reference thereto.

We beg leave to submit this supplemental brief as a more thorough and complete discussion of the principal portion of our original brief and also as an answer to some of the arguments contained in the brief of defendants in error on the question of the pardon, and the discussion of the exception of no cause of action.

I.

It is beyond doubt that had there been *no sale made* by the Marshal of that which was seized, libelled, condemned and ordered to be sold, the pardon granted to and accepted by Bosworth would have worked a dismisal of all the confiscation proceedings and would have restored the *res* seized, libelled and condemned, to him, upon exhibiting his pardon and paying costs accrued up to date of restitution; no matter what that *res* was, whether it was *land* simply, his *ownership* of the land, his *life estate* in land, or whatever was the *res* proceeded against.

This was because the *res* had been seized by the sovereign, the *United States*, and its condemnation sought as a consequence of certain rebellious acts and offenses committed by Bosworth against the sovereign authority of his country, and, as the penalty attached to the commission of those offenses was *forfeiture*, the pardon of the government, in blotting out the offense, *remitted the forfeiture* and every right, title and interest in the *res* that *accrued to the government thereunder*.

This was even held in two cases under the *Act of August 6th, 1861*, in proceedings purely *in rem*, where the land and buildings

thereon had been used with the owners' consent, as foundries for the manufacture of rebel cannon.

Armstrong's Foundry, 6 Wall. 766.

St. Louis Street Foundry, *Ibid.* 770.

It has also been decided, without a whisper of dissent, by this Court, that after a sale under the Confiscation Act of 1862 has been made, and there are any proceeds thereof in the registry of the Court, the pardon *restores* the proceeds to the owner, even if there be a condition in the face of the pardon, that the recipient "shall not by virtue of the pardon claim" such proceeds. This is because "a pardon is an *Act of Grace* and limitations upon its operation are *strictly construed*."

Osborn vs. United States, 91 U. S. 474

When a sovereign grants immunity or restoration of rights he does so with no hesitating hand, he does it *graciously* and *munificently, like a King.*

The President of the United States has full and free sovereign grace as to all offenses committed against the United States, with only the limitations laid down in the Constitution itself. These restrictions are:

1st. In cases of Impeachment.

2d. Where money is in the treasury, the public fisc, no power but an appropriation made by *Congress* can withdraw it.

3d. It cannot divest *vested rights* of third persons.

The last two heads are logically the same because the *fisc* is always a *third person* in public law. Goudsmit's Pandects. Translation with notes on Common Law by R. DeTracy Gould. London, 1887. Longmans, Green & Co.

No decision of this Court has ever curtailed the President's power of pardon *outside of these limits*, set in the organic law of the land.

But suppose there has been a forfeiture to the Government and a sale thereof of this forfeited *res* to a purchaser, and the pro-

ceeds of sale are paid into the treasury, and then comes the President's pardon, what effect is to be given to it?

It is certain that the power of *Grace* is as far reaching as the power of *Law*. Congress cannot *punish* any further than the President can *pardon*. The pardon makes honorable the offender, and does not dishonor the government. *Ex parte Garland*, 4 Wall. 333.

It surely restores whatever the Government holds, except money in the treasury, it gives back to the offender all his civil and political rights, it removes all suspicion from him or his acts thereafter; in short, it restores to him everything that has been taken from him by the *forfeiture*, except only what has already *vested* in a third person by virtue of the judgment of forfeiture itself.

There can be no doubt about this; it is certain.

What, then, is the effect of a *sale* under the Act of July 17th, 1862; what interest or estate in lands forfeited does *it* convey to the *purchaser?*

Plainly it conveys by the terms of the act and by all the decisions thereunder, such title to the *purchaser* as was seized, libeled, condemned and forfeited to the *United States*. The United States *seizes*, *libels*, *condemns* and *sells* to a purchaser a certain *res*, be it lands simply, or an estate for life in lands, a fee simple title to lands, or any other interest therein or right thereupon, no matter what; that *res*, whatever be its quantity, or its duration, its length, breadth, thickness, its heighth, weight or depth, its color, smell or taste, or by whatever mark or characteristic you describe it, is the same *res*.

Any attempt to make anything else out of this is pure sophistry, not warranted by anything in the Confiscation Act, or its reasons, expressed or implied.

Now, what effect does the joint resolution have upon the Act

of July 17th, 1862, where land or some interest in land is forfeited and sold?

The joint resolution provides that "no proceedings under said act shall be construed to work a *forfeiture* of the real estate, beyond the natural life of the offending owner."

So that the nature and extent of the title of anyone claiming as purchaser under this act must be determined by the nature and extent of the *forfeiture*.

If the *forfeiture* was absolute, the purchaser acquired *title* absolute. If the forfeiture was not *absolute*, the title acquired was not absolute.

It is difficult to see what "corruption of blood" has to do with the question. *First*, because there is no such thing in the law of the United States as "corruption of blood," as it is known in England. Constitution, Art. —. *Second*, because neither the joint resolution nor the confiscation act say a word about "corruption of blood," or intimate any such thing.

Corruption of blood is a consequence of *escheat*, a Norman doctrine of the feudal tenures. Forfeiture is a Saxon doctrine, and is a consequence of punishment for crime. *2 Minor's Institutes, p. 551.*

In the case of forfeiture under the act August 6, 1861, the purchaser at the confiscation sale acquired *an absolute title in fee* to the land, not because there was corruption of blood, but because the *forfeiture was "complete and absolute."*

Kirk vs. Lynd, 106 U. S. 315.

In case of forfeiture arising under the Act of July 17, 1862, the purchaser at the confiscation sale acquired a right of property or title to the land, no matter what that right be called, which terminated upon the death of him in whose hands it was forfeited.

Bigelow vs. Forrest, 9 Wall. 339.

What was the *nature* and extent of the title or right of proper-

ty in the last case? Clearly it was not and cannot be called an absolute title. It was a title or right of some kind in or to land for the life of another; limited in *duration ex confesso*. Was it limited in any other way, as to *absolute dominion* over the land during that time? Could that purchaser commit waste? Could he use or abuse the land as he pleased? Is he bound to keep down taxes, or is his enjoyment and power over it limited simply to the enjoyment of the land and the taking of its fruits and products?

In other words, are not his powers and his rights as to that land simply the rights and powers of the tenant of a *life estate*, a tenant *for the life of another* at common law, a usufructuary in the civil law? *It has been solemnly decided that they are* those of a tenant for the life of another. Only this and nothing more.

Pike vs. Wassell, 94 U. S. 711.

Waples vs. Hays, 108 U. S. 6.

Where, then, is the force of the dictum in *Wallach vs. Van Riswick*, to the effect that "what was seized, condemned as forfeited and sold in proceedings against Charles S. Wallach's estate, was not therefore *technically* a life estate," since it was decided in *Pike vs. Wassell, 94 U. S. 711*, and *Shields vs. Shiff, 124 U. S. 351*, that it was *really* a life estate.

In *Bigelow vs. Forrest, 9 Wall. 339*, it was clearly and certainly intimated, if not said *totidem verbis*, that the purchaser acquired the *life estate* of Forrest, and that the life estate was all that the government seized, libeled, condemned and sold.

This language was repeated in *Day vs. Micou, 18 Wall. 156*, and made more plain by saying that the *life estate* "was all that was within the *judicial power* of the District Court," and this decision was rendered by the same *Justice* who rendered *Bigelow vs. Forrest*.

Mr. Justice Miller so understood it, as is shown by his opinion

in *Ex Parte Lange, 18 Wall. pp. 177, 178*, where he quoted *Bigelow vs. Forrest*, saying it was "*a case directly in point.*"

It was understood in the same sense by Judge Dillon, in Pike vs. Wassel, 2 Dillon, C. C. 555; by Judge Woods of the Fifth Circuit, in *Chaffraix vs. Shiff* (not reported), and by the Supreme Court of Louisiana in *Micou vs. Benjamin & Day, 26 An. 718*; affirmed by this Court in *Day vs. Micou, 18 Wall. 156*, in *Burbank vs. Conrad, 27 An. 152*, and in *Slidell vs. Huppenbauer, 27 An. 383.*

It never was doubted, gainsayed or denied by any court, until *Wallach vs. Van Riswick, 92 U. S. 202*, where this Court said: "What was seized, condemned as forfeited, and sold, in the proceedings against Charles S. Wallach's estate was not therefore technically a life estate. *It is true that in Bigelow vs. Forrest, 9 Wall. 339*, and *Day vs Micou, 18 id 156, some expressions were used* indicating an opinion that what was sold was a life estate carved out of a fee. The language was perhaps incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the *quantity* of estate carved out; and what we said had reference solely to its *duration.*" (P. 211.) (Italics ours.)

Just here it may be asked, what is the difference between the expressions, "the whole quantity *(all)* of A's estate for the period of his life," and "an estate whose *duration* is the natural life of A?" Do they not mean the same thing? If they do not mean the same kind of an estate, then the former estate is an impossible one in Louisiana law. *Marshall vs. Pierce*, 34 An. 557. Why, this very term *quantity* was used in *Bigelow vs. Forrest (p. 351)*, where the Court said, in speaking of the status of the decree, "all this is descriptive, not of *quantity* of estate, but of the subject of seizure, and that was land. The proceeding was required by the act of Congress to be *in rem*, and the decree condemned, not the estate of French Forrest, but using its own words, 'the real property men

tioned and described in the libel.' The marshal was ordered to sell the said property, the boundaries of which were given in the title to the decree. Had the purchasers looked at that decree (and knowledge of it must be attributed to them) they would have seen that it was a decree of confiscation of the land, and they were bound to know its legal effect. It is therefore a mistake to argue that the plaintiff below was permitted to impeach collaterally the decree under which the marshal's sale was made, or that the judgment in this case impeaches it. The argument assumes what cannot be admitted, *that the decree of the District Court established a confiscation reaching beyond the life of French Forrest, for whose offense the land was condemned and sold.*"

So in the case of *Wallach vs. Van Riswick*, the very *terms of the decree* condemned the land "during the *natural life*" of Wallach, in the very words of the joint resolution. See Wallach vs. Van Riswick, I McArthur Rep. Supreme Court of District of Columbia, 85.

Perhaps this is the reason why this Court said in Wallach's case, "it (the proclamation) could not give back the *property which had been sold* or any interest in it (that is in the property which had been sold), either in possession or expectancy."

In the case at bar the decree condemned by its express terms "all the *right, title and interest* of A. W. Bosworth in and to the land," describing it.

Can these defendants in error be permitted to impeach *this decree collaterally* any more than we can? and did not the Circuit Court below impeach it collaterally? Here was a decree importing by its very terms a confiscation reaching *beyond the life* of A. W. Bosworth. Does it mean legally the same thing as the decree in *Bigelow vs. Forrest* and the decree in *Wallach vs. Van Riswick?* If it does, then all that is said about "*land*" and "all the right, title and interest in land" in Bigelow vs. Forrest and Wallach

vs. Van Riswick, and the difference between *duration* and *quantity* as applied to life estates or estates for life is unintelligible.

Of course, the amnesty could not give back the property which had been *sold* or any interest in *it*, either in possession or expectancy. Our point is that the right of property which we claim the pardon and amnesty restored to Bosworth *was not sold*, and that the defendants in error are estopped, by the very averments of their petition and the legal necessities of their case, *from saying that it was sold*. They saw themselves off, if they do so.

They take from their ancestor, A. W. Bosworth, by *inheritance* the fee simple (which was not sold at confication sale); we take from A. W. Bosworth *by purchase* the fee simple (which was not sold at confiscation sale), but which the government reserved from condemnation and sale and which, no matter where it was during the life estate, the pardon gave him power to alienate *for his own and the heirs' benefit.*

We care nothing about the fanciful common law doctrines of "livery of seizin," or the application of the Rule in Shelley's Case to get around the difficulties of the omission of this feudal formality; this is a suit in a Civil Law State and is to be governed by Civil Law maxims.

In the civil law the old French maxim is traditional and fundamental: "*Le mort saisit le vif, son hoir, le plus proche, et habile a lui succéder.*" "The dead man *seizes* the living man, his nearest heir, capable of succeeding him." He seizes him both as to his rights and his obligations in the *very fact of death.* He need not die actually seized of lands; there is no such formality as livery of seizin required, but he must have the *right* of seizin, or the *might* of seizin, in order that the heir shall have anything to inherit. If he has the *right* of seizin or the *might* of seizin he can dispose of such *right* or *might*, if not under legal disability, by conveyance for value, which enures to the heir's benefit.

If the conveyance does not enure to the heir's benefit, the heir

can attack it *directly* and have it declared "no bar to his recovery," but he must do this by solemn allegation and conclusive proof that such conveyance was a sham and a simulation, and was made in *fraud of the legitime of the forced heir;* he cannot avoid it insidiously, collaterally and in bad faith, as is attempted to be done here.

Under the decision of *Pike vs. Wassell*, 94 U. S. 711, the heirs might have brought a bill in Equity during their father's life, to have his conveyance declared a cloud upon *their title*, and had it removed by a solemn decree, but here they attempt to enforce *equitable* rights collaterally in a suit at law, when there is not a shadow of *equity* in their case.

"No such collateral attack is sanctioned by our jurisprudence," said Justice Poché in *Shields vs. Shiff, 36 La. An. 644*, where a perempted and dead mortgage securing a prescribed note was foreclosed against the ancestor with his consent. This is doubtless also the doctrine in common law States.

It is impossible to see how the Rulé in Shelley's case can aid the heirs in gobbling up this confessedly *unvested* remainder, divested of the pardoned and restored ancestor's debts, of which they have received the full benefit. If any man had ever uttered such a sacrilegious piece of legal blasphemy in England, he would doubtless have been "scourged" out of the temple of justice, for his presumption.

Professor Minor, in his great work, the "Institutes of Common and Statute Law," says, in speaking of the reasons, policy and advantages of the Rule in Shelley's Case:

"The reasons for the rule may be stated as follows, namely: (1) To prevent the lord from being deprived of the feudal incidents of wardship and marriage; (2) to prevent the inheritance from being in *abeyance* during the ancestor's life; (3) To prevent the non-alienability of the inheritance during the ancestor's lifetime;

and (4) to preserve the marked distinctions between descent and purchase."

Of the third reason and the second he says:

"This reason and the second are much insisted on by Mr. J. Blackstone in his famous argument in Perrin vs. Blake (4 Burr. 2579; Harg. Law Tracts, 499, 500), in which he ascribes the rule, in part, to a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner than if the ancestor were regarded as only tenant for life, and the heir as the purchaser of the inheritance.

"He likens the case to the ordinary limitation to a *man and his heirs*, which is universally recognized without dispute, as vesting an inheritance in the grantee himself, who, in the quaint language of Lord Coke, 'during his life beareth in his body (in judgment of law) all his heirs,' who are so totally in him that, in the case supposed, he may give the lands to whom he will. And with a manliness which does him honor, considering the fashion which just then prevailed of decrying the rule, the learned commentator declares that, however narrow and illiberal the original establishment of the rule, or the adhering to it in later times, may have been represented in argument, he was of opinion that those constructions of law which tended to *facilitate the sale* and circulation of property in a free and commercial country, and which make it more liable to the debts of the *visible owner* who derives *a great credit* from that ownership, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families by fettering inheritances till the full age of posterity as yet unborn, and which may not be born for half a century (Hargr. Law Tracts, 500)."

"4th. To preserve the Marked Distinctions between *Descent and Purchase* and to Prevent Title by Descent from being Stripped of its Proper Incidents (*e. g.* Liability *for Debts*), and Disguised

with the Qualities *of a Purchase*. If the heir takes by *purchase*, he is not liable, by virtue of his ownership of the lands, for the ancestor's debts; but if the inheritance is vested in the ancestor, the heir succeeding thereto is, to the extent of its value, answerable at common law for the ancestor's record debts, and the specialty debts binding on the heirs, and in Virginia for *all the debts*. (2 Th. Co. Lib. 151, n. (P).)

"This fourth reason is particularly insisted on by Mr. Hargrave in his masterly exposition of the rule (Hargr. Law Tracts, 489, 551; 2 Th. Co. Lib. 151, n. (P))"

Minor's Institutes, Vol. 2, Book 2, Chap. XI, pages 396, 397.

It would seem to appear from the use which was made of this rule in *Wallach vs. Van Riswick*, 92 U. S. 202 (*if the construction of the Circuit Court and of the defendants in error of that decision is correct*), that the rule was there invoked as a kind of legal legerdemain, or ingenious apology for keeping property tied up, out of commerce, in abeyance for a whole generation, not to be determined by Louisiana laws, not subject to the ancestor's debts, not subject to the eminent domain of the State of Louisiana, and in utter contempt of her Codes, her statutes and her jurisprudence.

This Court has cleared up the whole subject by declaring in unmistakable terms, "the heir takes by *inheritance* under the *lex rei sitæ*," *not* by purchase from the government of the United States or by the effect of the confiscation statutes.

Avegno vs. Schmidt, 113 U. S. 293.

Shields vs. Shiff, 124 U. S. 351.

The whole case of the defendants in error here is in a pitiful state of inconsistency and contradiction, which is suicidal of their right to recover.

For the purpose of attack and for urging their pretended claims they claim to be *heirs* of the blood; for the purpose of avoiding being bound by their pardoned father's conveyance,

they insist that they are *third persons*, purchasers. For the purpose of claiming the benefit of the saving contained in the joint resolution explanatory, they would attack the decree of confiscation collaterally; for the purpose of defeating the operation of the pardon granted to their father, they say the decree is absolute in terms, it cannot be impeached collaterally. For the purpose of claiming the benefit of the valuable improvements on the land, they say we are really and legally a *mere usufructuary*, a tenant for the life of another, and that we thereby lose the benefit of such improvements, when our tenancy terminates; for the purpose of avoiding the necessary legal implication which is involved in such statement of the law, namely, that the fee *must therefore dwell in some definite and well known person*, during the life estate, and which person can *therefore dispose of it for value*, they say we are not a *technical* usufructuary, we are not an usufructuary at all, we are an *anomalous thing*, wholly unlike a tenant for life, and they decline to tell us what we are. They accept the succession under "*benefit of inventory*," for the purpose of avoiding the debts; they would include in their benefit of inventory as *assets* both the price of the land and the very land itself. Can a man eat his cake and have it, too?

"What shall we say unto the children of this generation? They are like unto children sitting in the market place, crying unto their fellows, and saying: We have piped unto you and ye have not danced; we have mourned unto you and ye have not lamented. John the Baptist came fasting and praying and ye say, 'he hath a devil;' the Son of man cometh, eating and drinking, and ye say, 'behold a glutton and a wine bibber, a friend of publicans and sinners.' But wisdom is justified of all her children."

II.

2d Assignment of Error.

The Circuit Court erred in overruling the exception of no cause of action filed by the said Chicago, St. Louis and New Orleans Railroad Company, one of the plaintiffs in error.

The decree below cannot stand upon any possible ground. The Court was *incompetent* to make any such decree, even if the Railroad Company *had forcibly taken possession of the land*, without any title or shadow of title whatever. All the defendants in error could legally ask, would be adequate and just *compensation* for the land taken, and for damages incidental thereto, or, at most, for a decree in the *alternative* for the *price* or *value* of the land, or for ejectment in the event of failure to pay such price.

This discussion properly falls under the head of the *second assignment of error*, the *exception of no cause of action*, but in our original brief we dicussed that question merely as if we were a private individual, and upon the naked ground of *title* only, and without in that place claiming that we were a *quasi* public corporation, whose rights to take and hold real estate must be determined solely by the law of *Eminent Domain* of the State, and not by any considerations of Federal policy, *supposed* to have been had in mind by Congress something like a quarter of a century ago.

These considerations were however insisted upon in our discussion of the plea of prescription.

St. Julien vs. Railroad Company, 35 An. 924.
Mitchell vs. R. R. Company, 41 An. 363.
Same Case, *Sou. Rep.*, Vol. p.
Goodin vs. Cincinnati, 18 Ohio, 169.
Mills on Eminent Domain, § 140.

Pierce on Railroads, 169, 230.

Bourdein et al. vs. Railroad Company, 35 An. 947.

Day vs. Railroad Company, 36 An. 246.

The decree below cannot be justified, and, we submit, must therefore be reversed.

Respectfully submitted,

GIRAULT FARRAR,

Of Counsel.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 79.

ILLINOIS CENTRAL RAILROAD COMPANY AND THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFFS IN ERROR,

versus

MILLARD BOSWORTH AND CHARLES H. BOSWORTH, DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

Reply ~~SUPPLEMENTAL~~ BRIEF OF PLAINTIFFS IN ERROR.

THOS. J. SEMMES,
Of Counsel for Plaintiffs in Error.

T. H. Thomason, Printer, New Orleans.

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Error to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

It is clear that the plaintiffs cannot recover on the ground that they became owners of the property in question by virtue of the confiscation under the Act of 1862, and the joint resolution of Congress passed on the same day. If they succeed at all, it is because they derive title by descent from Abel W. Bosworth under the law of Louisiana. The averment of heirship is "that your petitioners are the only legitimate children of the said Bosworth,

who have survived him, and that your petitioners have accepted the succession of said Bosworth under benefit of inventory." In the language of the law they represent themselves to be the "forced heirs" of Bosworth, who have not become owners of the property as unconditional heirs of their ancestor, but who claim whatever title the law gives them as beneficiary heirs. This brings us to the consideration of the difference between simple or unconditional, and beneficiary heirs.

The unconditional acceptance of a succession as heir is called simple acceptance, and may be express or tacit.

"The simple acceptance may be either express or tacit. It is express, when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." *Article 988, C. C.*

"The person called to the succession does an act, which makes him liable as heir, if, when cited before a court of justice as heir for a debt of the deceased, he suffers judgment to be given against him in that capacity, without claiming the benefit of inventory, or renouncing the succession." *Article 1000, C. C.*

"The donation, sale or assignment, which one of the co-heirs makes of rights of inheritance, either to a stranger or to his co-heirs, is considered to be, on his part, an acceptance of the inheritance." *Article 1002, C. C.*

"Those who are not capable of contracting obligations, such as persons interdicted, cannot accept an inheritance; but the curators of such persons can accept successions falling to those who are under their curatorship, by pursuing the formalities prescribed by law." *Art. 1004, C. C.*

"Nevertheless, if the heir who has expressly or tacitly accepted the succession has not put himself into possession before he has

caused a true and faithful inventory to be made, in conformity to that which is prescribed to the beneficiary heir, he can discharge himself from paying the debts of the succession out of his own property by abandoning the effects of the succession to the creditors and legatees of the deceased, and rendering them a faithful account of the same, as well as of the fruits and revenues received by him.

"But in order to enjoy this advantage, the heir who has accepted must not have disposed of any of the property, movable or immovable, of the succession, except in the forms prescribed in the case of the benefit of inventory.

"He must not have been decreed by a definitive judgment to be the unconditional heir, nor have accepted, at the suit of the creditors instituted to oblige him to assume this quality." *Article 1110, C. C.*

"The effect of the benefit of inventory is that it gives the heir the advantage :

"1. Of being discharged from the debts of the succession by abandoning all the effects of the succession to the creditors and legatees;

"2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due him from it." *Art. 1054, C. C.*

A beneficiary heir who undertakes to act as owner of the property inventoried, by its sale, or alienation in any other mode than that prescribed by law for the sale of property of a succession under the administration of an executor, or administrator, becomes an unconditional heir, and as such, owner of all the property of the succession and liable for all its debts, whether the property be sufficient to pay them or not. *Benedict vs. Bonnot, 39 La. An. 972.* Hence, it follows that, an heir who accepts with benefit of inventory accepts as a *quasi* administrator of the succession of the deceased, and if he desires to retain the status

of beneficiary heir, he has no power to dispose of the property of the succession except in the manner pointed out by law for the sale of the property of a succession under administration. It is therefore clear that suits brought for the recovery of property by a beneficiary heir are suits brought to recover that which belongs to the deceased, and to be administered as the property of the deceased; and if the deceased could not recover, the beneficiary heir cannot be more successful.

In the case of *Gillaspie vs. Citizens' Bank, 30 An. 1319*, the Court said: "The beneficiary heirs, while they cannot be allowed to recover and obtain possession until the debts are paid, may certainly maintain any action that may be necessary either to reduce the amount of the debts of the succession, or to bring into it property which belongs to it which may be in the possession of and claimed by others.

"With respect to the rents of this property, as these heirs are beneficiary heirs, the rents do not belong to them; they belong to the successions of their mother and grandfather, and will be assets for the payment of the debts, if such rents are due and recoverable."

In *Cox against Martin's Heirs, 12 Martin, 363*, the Court said, in speaking of heirs who accept with benefit of inventory under the Code of 1808: "On referring to the Civil Code, where it treats of heirs with the benefit of inventory, it seems that they are placed nearly on the same footing with curators of vacant successions. On page 168, Article 4, we find it laid down that, although the heir who accepts with benefit of an inventory be really the lawful heir and true successor of the deceased, the effect, however, of the benefit of inventory is to make him appear in the eyes of the creditors and legatees of the succession rather as the administrator of the estate than as true heir and proprietor of it, though he be required under certain circumstances to give security for the value of the property contained in the inventory."

So, in the case of *Flower vs. O'Connor, 7th La., page 209*, the Court said: "The acceptance of the estate * * * was an engagement, as relates to creditors, that if she did not administer the estate according to law as beneficiary heir, she would be personally liable for the debts, that if she neglected to take an inventory and other conservatory steps; if by disposing of the property belonging to the estate as her own she put it out of her own power to make to the creditors a fair exhibit of the means of the estate to pay its debts; then the creditors should have a right to consider her as having forfeited the benefit of inventory and made herself unconditional heir."

It follows as a natural consequence of this doctrine that the beneficiary heir is entitled to nothing in the succession except the residuum which upon a legal administration may remain after payment of debts and legacies; and, therefore, the plaintiffs in this case, in the face of the guarantee contained in the act of sale of their ancestor, cannot recover as beneficiary heirs the property which belonged to their deceased ancestor, and which by claiming it as beneficiary heirs they admit belonged to him.

This argument is based on the peremptory exception of no cause of action. It goes to the foundation of the suit and may be urged at any stage of the cause.

Union Bank vs. Dunn, 17 La. 234.

Brown vs. Saul, 4 N. S. 437.

But even if this were a dilatory exception, such exception is not waived when disposed of by the Court in its decision, as was done in this case by the Circuit Court.

Hickman vs. Dawson, 33 La. An. 440.

Thibodeaux vs. Comeau, 30 La. An. 1119.

Respectfully submitted,

THOS. J. SEMMES,

Of Counsel for Plaintiffs in Error.

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BRIEF OF THE DEFENDANTS AND APPELLEES.

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BRIEF OF THE DEFENDANTS AND APPELLEES.

STATEMENT OF CASE.

The plaintiffs in error are appellants from a judgment, rendered against them in the Circuit Court of the United States for the District of Louisiana, adjudging to the defendants in error a tract of land and the permanent improvements thereon, which formerly belonged to their deceased father, and which was confiscated in due form of law under the confiscation act and joint resolution of July 17th, 1862.

The father of the defendants, Abel W. Bosworth, died on the 11th day of October, 1885. The action

of ejectment was instituted on the 8th day of December, 1885.

The case was tried below on an agreed statement of facts, in the nature of a special verdict, and, as this succinctly states the whole case, we quote it:

"1st. The plaintiff, Millard Bosworth and Charles H. Bosworth, are the only surviving legitimate children of Abel Ware Bosworth, who died intestate in the City of New Orleans on the eleventh day of October, 1885, and have accepted his succession with benefit of inventory.

"2d. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and others, a one-third undivided interest in fee simple title, and full ownership, in and to the property described in the petition of the plaintiffs in this cause.

"3d. On the breaking out of the war between the States, Abel W. Bosworth entered the Confederate army and bore arms against the Government of the United States from about March, 1861, until April, 1865.

"4th. Under and by virtue of the confiscation act of the United States, approved July 17th, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day of January, 1865, a libel of information was filed against the said property, as the property of A. W. Bosworth, in the District Court of the United States for the Eastern District of Louisi-

ana. Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and after due proceedings had, the said court entered a decree of condemnation as to A. W. Bosworth, and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one-half of said one-third undivided interest in and to said property.

"A *venditione exponas* in due form of law issued to the marshal for the sale of said property under said decree, and at said sale 'all the right, title, and interest of A. W. Bosworth in and to the one undivided third part of said property,' (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the court) was adjudicated on the —— day of the month of May, 1865, to E. W. Burbank for the price and sum of $1,700, and the marshal executed a deed in due form of law to said Burbank for the same.

"5th. Subsequently thereto, in March, 1869, the said A. W. Bosworth filed a libel of review in said District Court in said cause, making said E. W. Burbank, the purchaser of said property, a party thereto, which said libel of review was dismissed; that subsequently thereto, in the month of February, 1870, the said A. W. Bosworth took a writ of error to the Circuit Court of the United States from the judgment of condemnation aforesaid, which said judgment of condemnation was affirmed in the said Circuit Court upon the writ of error aforesaid.

"6th. That on the second day of October, 1865,

Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked 'Document A.'"

"7th. That on the 23d day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned, and transferred to Samuel H. Edgar, with full warranty under the laws of Louisiana, all their right, title, and interest in, and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and described in the petition, for the price and sum of eleven thousand six hundred and sixty-six $66\frac{2}{3}$ dollars.

"8th. That on the 18th day of December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title and interest, in the nature of a quitclaim, to S. H. Edgar aforesaid for the price and sum of five thousand one hundred dollars.

"9th. That the said S. H. Edgar, by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana in New York City, on the 10th day of October, 1872, and duly recorded in the office of the Register of Conveyances for the Parish of Orleans, on the 30th day of October, 1872, sold and transferred the same property, with full warranty

under the laws of Louisiana, unto the New Orleans, Jackson and Great Northern Railroad Company.

"10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis and New Orleans Railroad Company, who has leased the same to the Illinois Central Railroad Company, which said Company holds said property under said lease.

"11th. That said property sued for in this case and described in the petition is variously estimated in value, the plaintiffs contending that it is worth at least the sum of $25,000, and the defendants contending that it is not worth more than the sum of $10,000. No evidence is to be adduced as to the value of rents and revenues of this property, it being agreed that the claim of the parties plaintiff, in case they succeed, shall be dismissed as a non-suit.

"12th. That in the interval between January, 1873, and the death of said Bosworth, said defendants, the Chicago, St. Louis and New Orleans Railroad Company and the Illinois Central Railroad Company, lessee, have placed and constructed various betterments and improvements on said property, which are attached to the soil, such as platform, freight sheds, freight depots, railroad tracks, switches, etc., which the plaintiffs claim enure to their benefit, and which the defendants deny.

"13th. That the proportion of the improvements and betterments aforesaid placed by the Illinois Central

Railroad Company upon the property described in the petition from July 20th, 1882, down to the death of said A. W. Bosworth, amounts to the sum of two thousand five hundred dollars.

"14th. It is further agreed, as a part of this agreement of facts, that the President of the United States, on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms of said proclamation, as found in the Statutes at Large of the United States, are made part of this statement of facts."

The special pardon mentioned in the statement is found in the Record, from pages 17 to 18; and among other conditions upon which the pardon was granted is this:

"4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property or the proceeds of any property that has been sold by the order, judgment or decree of a court under the confiscation laws of the United States."

The Illinois Central Railroad Company, being in possession of said property at the time the action was instituted, it alone was made defendant under the provisions of Article 43 of the Louisiana Code of Practice, which provides that "the petitory action, or one by which real property or any immovable right to such property may be subject, is claimed, must be brought against the person who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee. But if the farmer or lessee of a real estate be sued for that cause

of action, he must declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State or is represented therein, and he must defend it in the place of the tenant, who shall be discharged from the suit."

The Illinois Central Railroad Company at first filed a disclaimer, averring that it held the property from the Chicago, St. Louis and New Orleans Railway Company under a lease. However, it subsequently filed an answer setting up title in the Chicago, St. Louis and New Orleans Railway Company, and calling that Company in warranty to defend the cause.

The substance of its answer is, that the transfer from Abel W. Bosworth, father of the plaintiffs, to the vendor of the Chicago, St. Louis and New Orleans Railway Company, conveyed an absolute title, binding upon the heirs of Abel W. Bosworth, because at the time that this transfer was made, Abel W. Bosworth had been pardoned by President Johnson, and because he also fell under the provisions of the amnesty proclamation of 1868. They averred that this title from Bosworth operated as an estoppel upon his heirs.

It further averred that it had put improvements upon the property to the value of twenty-five hundred ($2500) dollars, and in case of eviction it claimed in reconvention from the plaintiffs the value of those improvements.

In answer to the call in warranty the Chicago, St.

Louis and New Orleans Railway Company filed a pleading which it styled "Exception and Answer."

The first exception is to want of capacity of the plaintiffs, to institute and maintain the suit.

The second exception is one of no cause of action.

For answer it adopts all the allegations of the answer of the Illinois Central Railroad Company, and further pleads the prescription of ten years.

Upon these issues, and the above statement of facts, the cause was submitted to the Court which rendered a judgment for Millard and Charles H. Bosworth, ejecting the defendant Companies from the property, and rejecting the reconventional demand of the Illinois Central Railroad Company.

Argument.

In this Court the plaintiffs in error have filed five assignments which we shall take up and discuss in their order.

First Assignment. *That the Circuit Court erred in overruling the exception of the Chicago, St. Louis and New Orleans Railway Company, one of the plaintiffs in error, to the capacity of the defendants in error to sue.*

This plea is a mere dilatory exception, filed in direct violation of the provisions of Article 333 of the Code of Practice.

That Article is as follows:

"Art. 333. It is a rule which governs in all cases of exceptions, except in such as relate to the absolute incompetency of the Judge before whom the suit is

brought, that they must be pleaded specially *in limine litis*, before issue joined, otherwise they shall not be admitted. Hereafter no dilatory exceptions shall be allowed in any case after a judgment by default has been taken, and in every case they must be pleaded *in limine litis;* nor shall such exceptions hereafter be allowed in any answer in any cause."

Art. 332 declares, that "Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress, etc."

It is the settled doctrine in Lousiana that all exceptions to the capacity of a party to sue are dilatory exceptions. Cheevers vs. Burke, 19 La. 429; Wingate vs. Wheat, 6 An. 239; Robatham vs. Tete, 8 An. 73; Dyer vs. Drew, 14 An. 658.

Again, it is the settled practice in Louisiana that all dilatory pleas and exceptions to forms are waived if the parties without requiring a decision thereon proceed to trial on the merits. Hennen's Digest, p. 1163, *Verbo* Exceptions, No. 1.

We confess that we do not understand the argument contained in the brief of the plaintiffs in error on this assignment. It appears to maintain the proposition that a beneficiary heir is not an heir and does not represent the *persona* of the deceased.

If this is the purport of the brief, the statement is made in utter disregard of the law of Louisiana.

To support this statement it is only necessary to quote a few Articles of the Civil Code.

"Article 940. A succession is acquired by the

legal heir, who is called by law to the inheritance, immediately after the death of the deceased person whom he succeeds."

"Article 941. The right mentioned in the preceding Article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession or has expressed any will to accept it.

"Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of right and not in fact."

"Article 942. The heir being considered seized of the succession, from the moment of its being opened, the right of possession which the deceased had, continues in the person of the heir as if there had been no interruption, and independent of the fact of possession."

"Article 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case that he was ignorant that the succession was open in his favor."

"Article 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir in everything represents the deceased,

and is of full right in his place as well for his rights as his obligations."

"Article 947. The heir who accepts is considered as having succeeded to the deceased from the moment of his death, not only for the part of the succession belonging to him in his own right, but for the parts accruing to him by the renunciation of his co-heirs in the succession of the deceased."

The law of Louisiana provides two methods of accepting a succession; one is called "an acceptance pure and simple; the other is called "an acceptance under benefit of inventory."

Some of the heirs may accept purely and simply, and some may accept under benefit of inventory, but they are both equally heirs, though with different effects.

Article 1008 of the Civil Code says: "When several heirs in the same degree are called to a succession, some may accept unconditionally, others under the benefit of an inventory; for the unconditional heir does not exclude the heir under the benefit of inventory."

The only difference between the unconditional heir and the heir with the benefit of inventory is as to the liability of the heirs for the obligations and debts of their ancestor, and as to the preservation of their own individual rights against the estate of their ancestor.

Article 1013 of the Civil Code says: "The effect of the simple acceptance of the succession, whether expressed or tacit, is such, that when made by an heir

of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts, or as if he was the deceased himself; unless, before acting as heir, he make a true and faithful inventory of the effects of the succession, as here above established, or has taken the benefit treated of hereafter."

Article 1054 declares: "That the effect of the benefit of inventory is that it gives the heir the advantage—

"1. Of being discharged from the debts of the succession by abandoning all the effects of the succession to the creditors and legatees.

"2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due him from it."

Article 1423 also declares: "The heirs by the fact alone of the simple acceptance of a succession left them, contract the obligation to discharge all the debts of such succession, to whatever sum they may amount, though they far exceed the value of the effects composing it.

The only exception to this rule is when the heirs, before meddling with the succession, have caused a true and faithful inventory thereof to be made, as is prescribed in the section of this title which relates to the *benefit of inventory;* for in this case they are only

bound for the debts to the amount of the value of the effects found in the succession."

The Supreme Court of Louisiana has often interpreted these Articles, and always in the same direction. Addison vs. New Orleans Savings Bank, 15 La. 527; Le Page et al. vs. New Orleans Gas Light Company, 7 Rob. 183; Calvit vs. Mulholland, 12 Rob. 258; Womack vs. Womack, 2 An. 341.

So rigid does the court enforce the maxim "*Le mort saisit le vif*," that in the latter case it held that the right of the heir to bring a suit to recover succession property was not suspended during the delays within which he had the right either to accept the succession or to renounce it.

If Millard and Charles H. Bosworth be the only surviving children and legal heirs of their father, who died intestate, and were not competent to bring this suit, will the learned counsel on the other side please indicate who could maintain the suit?

As we shall show below, this Court has held that the heirs of one whose property was confiscated take the property at his death by inheritance, though their ancestor was not seized thereof at the time of his death. This apparent anomaly may fret the soul of the learned counsel, but it did not disturb the mind of the nine Judges of this Court in deciding the case of Wallach vs. Van Riswick, 92 U. S., p. 202; nor the English courts in holding a similar doctrine in deciding upon the effect of similar confiscation statutes in England. (*Ibid.*, pp. 210-213.) On this point your Honors said

(p. 212): "It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common law maxim, it must yield to statutory provisions inconsistent with it; and it is therefore of no weight in the inquiry, what was intended by the Confiscation Act and concurrent resolution? Undoubtedly there are some anomalies growing out of the Congressional legislation, as there were growing out of the Statutes of 5th and 18th Elizabeth; but it is the duty of the Court to carry into effect what Congress intended, though it must be by denying the applicability of some common law maxims, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attaint, though the Statutes declared that the forfeiture shall be during his natural life only."

And again (p. 212-213): "If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seized of an estate of inheritance—*e. g.*, reversion or remainder—it may be answered that even at common law it was not always necessary that the ancestor should be seized to enable the heir to take by descent. Shelley's case is that where the ancestor might have taken and been seized, the heir shall inherit. Fortescue, J., in Thornby vs. Fleetwood, 1 Str. 318.

"If it were true that, at common law, the heirs could not take in any case, their ancestor was not seized at

his death, the present case must be determined by the Statute. Charles S. Wallach was seized of the entire fee of the land before its confiscation, and the Act of Congress interposed to take from him that seizin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs."

SECOND ASSIGNMENT. *That the Circuit Court erred in overruling the exception of no cause of action filed by the Chicago, St. Louis and New Orleans Railway Company, one of the plaintiffs in error.*

The exception of no cause of action under the Louisiana Practice is nothing more or less than a general demurrer, which for the purpose of the plea admits to be true everything well averred in the petition.

This being true, where is the defect in the petition in this case which would justify the Court in dismissing it ?

It is perfect in form and perfect in averment.

It shows the heirship of the plaintiffs, the death of their father, intestate, the confiscation of his property under the Act of 1862, and the joint resolution, the possession thereof by the defendant, the value thereof, and the jurisdiction of the Court over the controversy.

The prayer is in accordance with the allegations.

As there is no formal argument in the brief in support of this assignment, we suppose that there is none to offer in its support.

THIRD ASSIGNMENT. *That the Circuit Court erred in overruling the plea of prescription filed by the Chicago,*

St. Louis and New Orleans Railway Company, one of the plaintiffs in error.

This plea is utterly without merit.

The defendants, as shown by the statement of facts, held under the confiscation title; their transferror, Edgar, took a title from E. W. Burbank, the purchaser at the confiscation sale, and also a pretended title from Bosworth, the confiscatee. Such a title could not even form the basis of the prescription of ten years under the law of Louisiana.

This was expressly decided by the Supreme Court in the case of Pendegast vs. Schawtz, 30 An. 591.

But there is another and better reason why there should be no prescription against the title of the plaintiffs.

It is a fundamental rule of the Civil Law that prescription begins to run only from the day when the right of action accrues.

Hence the maxim of the Roman Law, *contra non volentem agere nulla currit praescriptio.*

Hernandez vs. Montgomery, 2 Martin N. S. 422; Ayrand vs. Babin, 7 N. S. 471; Landry vs. L'Eglise, 3 La. 219; Pothier Des Obligations, 645; *Ibid*, De Prescription, Nos. 22 and 23.

In the case first above quoted the Court says: "Indeed, the idea of a man losing his right by not bringing an action which it was impossible he should bring, involves such a contradition in itself, and leads to such monstrous injustice that nothing short of the

most positive law could authorize any tribunal to sanction such a doctrine."

Abel W. Bosworth died, according to the statement of facts, on the 11th day of October, 1885.

The right of action to recover this property by his heirs did not accrue until that date. During his lifetime they had no authority to bring any action, except such an action as was brought by the heirs of Pike to compel the purchaser at confiscation sale to pay the taxes (Pike vs. Wassell, 94 U. S. 711.) All the right, title and interest of their father in the property had been divested by the confiscation sale. Their rights did not accrue until their father died; and as the tenant in possession was not committing any waste upon the property, they had no cause of action whatever with reference to the property during their father's life.

The action which accrued to them on the 11th day of October, 1885, they brought within two months; because the petition of ejectment was filed on the 8th day of December, 1885.

FOURTH ASSIGNMENT. *That the Circuit Court erred in rejecting the reconventional demand of the Illinois Central Railroad Company, one of the plaintiffs in error, for the value of improvements placed on the ground described in the petition.*

The Illinois Central Railroad Company is the lessee of the Chicago, St. Louis and New Orleans Railway Company.

It is admitted that in the interval between the year 1882, and the death of Bosworth, this lessee placed

certain permanent structures on the property which are attached to the soil, and which, under the law of Louisiana, are immovables by their nature.

The lessee cannot be in any better position in this matter than its lessor, the Chicago, St. Louis and New Orleans Railway Company.

And, indeed, the reconventional demand is directed against the wrong person. Instead of being directed against the plaintiffs in the case, it ought to have been directed against the warrantor.

The lessor warrants the lessee against eviction, and is liable as such warrantor.

So far as the plaintiff in the petitory action is concerned, it is a matter of indifference whether the improvements were placed by the one or the other of these Railroad Companies.

And from this point of view we shall argue the question.

Of course, the demand in reconvention is based upon the theory that the heirs of Bosworth are entitled to recover the property as claimed in their petition ; that is, that they recover it as the heirs of the confiscatee.

This being the case, the title of the Chicago, St. Louis and New Orleans Railway Company was an estate for life at the common law, and a usufruct during the life of Abel W. Bosworth under the law of Louisiana.

From which ever point of view it is regarded, all permanent structures and improvements made upon

the property by the tenant for life, or his representatives and assigns, revert to the owner of the fee at the termination of the estate.

This is the settled rule of the common law.

See American and English Encyclopaedia of Law, Vol. 6, page 832. *Verbo* "Estates."

So rigid is this rule, that even equity would give no relief to the tenant who, after the termination of the estate for life, files a bill averring that the improvements put by him upon the property were beneficial to the estate. Caldecott vs. Brown, 2 Hare, 144.

The estate for life of the common law is absolutely the same as the usufruct of the civil law.

The Supreme Court of Louisiana in the case of Pendegast vs. Schawtz, 30 An. 591-2, decided that the estate acquired by the purchaser at confiscation sale under the laws of the United States was the same as the usufruct of the law of Louisiana.

Regarding then the holder of a life estate as usufructuary, under the law of Louisiana, the right of the heirs of A. W. Bosworth to recover improvements made by the usufructuary is clear.

Art. 568 of the Civil Code declares: "The usufructuary cannot finish buildings commenced by the owner, nor erect new buildings on the land of which he has the usufruct, unless these buildings are necessary for working the land or for getting in the crops; he, however, may rebuild edifices and other works, which have been destroyed or thrown down by time or accident. The usufructuary cannot demolish or

destroy what he has once built or constructed, nor take away the materials; he must abandon the whole to the owner, at the end of his usufruct, without being able to claim any indemnity therefor."

This Article in the Code of Louisiana is nothing more than a reproduction of the rule of the Roman law to the same effect which comes to us through the Code Napoleon.

Art. 599 of the Code Napoleon declares: "That the usufructuary cannot at the end of his usufruct claim any indemnity for the improvements which he claims to have made, even when the value of the thing has been thereby augmented."

The rule was the same in France before the adoption of the Code. Ferrière Cout. de Paris, Art. 262; Domat De L'Usufruit, No. 19; Pothier Du Donaire, No. 276.

The rule of the Roman law was: "*Si quid inaedificaverit postea cum neque tollere hoc, neque refigere posse.*" D. 1, 7, t. 1, 15.

Proudhon, Vol. 3, No. 1441, declares, that under the French Code the usufructuary or his representatives can reclaim nothing from any kind or sort of work or construction made by him upon the realty covered by the usufruct, and this doctrine has been confirmed by the decisions of the French Courts. Rejet, 23 mars, 1825; Bourges, 24 fevr., 1837 (Dev., 38, 2, 108).

The Supreme Court of Louisiana, in the case of Brugere vs. the Heirs of John Slidell, 27 An. 70, decided that the purchaser at confiscation sale could

not recover from the heirs of the confiscatee the value of improvements and repairs put upon the property while it was in his possession.

FIFTH ASSIGNMENT. *That the Circuit Court erred in holding that the special pardon of A. W. Bosworth, set up in the pleading, and the general amnesty proclamation of December 25th, 1868, had not the effect of restoring to said Bosworth the power of selling or disposing of the lots of ground in question after the termination of the life estate conveyed at the confiscation sale, and of blotting out the offense committed by him, and thereby enabling him to exercise all his rights as to said property, except in so far as the same had been conveyed to Burbank, purchaser at said confiscation sale, and investing him with power to bind his heirs by any warranty in reference thereto.*

The whole argument of the plaintiffs in error is a covert attack upon the settled jurisprudence of this court, as declared in Wallach vs. Van Riswick, 92 U. S. 202; Chaffraix vs. Shiff, *Ibidem*, page 214; Semmes vs. United States, 91 U. S., page 21; Pike vs. Wassell, 94 U. S. 711; Wade vs. French, 102 U. S., page 132; Avegno vs. Schmidt, 113 U. S. 293; and Shields vs. Shiff, 124 U. S. 351.

In Wallach vs. Van Riswick, Wallach, the confiscatee, made a deed of the confiscated property to the purchaser, purporting to convey it in fee simple, with covenants of general warranty.

In the action brought by his heirs to recover the property, it was claimed that they were bound by this

warranty, and that the proclamation of amnesty of December 25th, 1868, had restored to Charles S. Wallach his rights of property.

After the fullest argument, this Court held:

1. That the Act of July 2d, 1862, is an Act for the confiscation of the enemy's property, and it provides for the seizure and condemnation of all their estate. When it has been carried into effect by appropriate proceedings in any given case, the offender has no longer any interest or ownership in the thing forfeited, which he can convey, or any power over it which he can exercise in favor of another.

2. That the joint resolution, of even date with that Act, was designed only to qualify and not to defeat it. The provision therein that "no proceeding shall work a forfeiture beyond the life of the offender," obviously meant that they shall not affect the ownership of the land after the termination of his natural life, and that after his death it shall pass, and be owned as if it had not been forfeited.

It was intended for the exclusive benefit of his heirs, and to enable them to take the inheritance after his death.

3. That the maxim that a fee cannot be in abeyance is not of universal application, nor has it any weight in an inquiry as to the intent and effect of said Act and joint resolution.

4. That the amnesty proclamation of the President of the United States of December 25th, 1868, did not give back property which had been sold under the

Confiscation Act, or any interest in it, either in possession or expectancy.

The Court, therefore, held that the heirs of Wallach were not bound by his warranty deed; that the amnesty proclamation gave Wallach no additional power or authority over the property confiscated; and hence, that his heirs were entitled to recover.

In Chaffraix vs. Shiff, Shiff had purchased the property at confiscation sale, and after that sale had obtained a deed from the confiscatee. He sold the property to Chaffraix, who refused to take it, on the ground that Shiff's title was defeasible by the death of the confiscatee, for the reason that his heirs were not bound by his deed. The Court refused to make the purchaser take the property, and re-affirmed the doctrine declared in Wallach vs. Van Riswick.

In Semmes vs. the United States, where Semmes pleaded a special pardon in the same form as that pleaded in this case, and also pleaded the amnesty proclamation for the purpose of obtaining the restoration to himself of property, which he claimed had been irregularly condemned and irregularly sold. The Court held:

1. That the condition of the special pardon above mentioned precluded any recovery of the property.

2. That the general amnesty proclamation, which was a pardon for treason, did not restore rights to property previously condemned, for the reason that proceedings under the confiscation act were justified as

an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason.

In Pike vs. Wassell, which was a bill brought by the children of Albert Pike during his life to compel the purchaser at confiscation sale to keep down the taxes during the life of their father, the Court said:

"In Wallach vs. Van Riswick, 92 U. S. 207, 208, we decided that after a seizure and an adjudicated condemnation and sale under the Confiscation Act of July 17th, 1862, of the land of one engaged in rebellion against the United States, *there was 'left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another.'*

"We also held that the joint resolution passed contemporaneously with the approval of the act was 'intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death.' As to him, the forfeiture was complete and absolute; but the ownership, after his death, was in nowise affected *except by placing it beyond his control while living.*"

And again, page 714: "It is true, as a general rule, that so long as the ancestor lives, the heirs have no interest in his estate, but the question here is as to the rights which the Confiscation Act has conferred upon the heirs apparent or presumptive of one whose estate in lands has been condemned and sold. In Wallach vs. Van Riswick, without undertaking to determine where the fee dwelt during the life estate, we decided that it was withheld from confiscation exclu-

sively for the benefit of the heirs; they, and they alone, could take it at the termination of the life estate.

"The children of Albert Pike, as his heirs apparent, are also apparently the next in succession to the estate. Either they or their representatives must take the title when their father dies. If they do not hold the fee, they are certainly the only persons now living who represent those for whose benefit the joint resolution of Congress was passed. They at least appear to have the estate in expectancy."

In French vs. Wade, 102 U. S., the facts were, that Wade, the confiscatee, had gone to the confiscation sale and purchased his own property. He subsequently sold the fee simple title to the same with full warranty to French. After his death, his children sued for the property and recovered it. The defense was, that his heirs were bound by his warranty deed, and were estopped from recovering the property. The Court said: "We think that the Court below was right in holding that this case was governed by that of Wallach vs. Van Riswick, in which we decided that after a seizure, and an adjudicated condemnation, a sale under the Confiscation Act of July 17, 1862, of the land of one engaged in rebellion against the United States, there was 'left in him no estate or interest, of any description which he could convey by deed, and no power which he could exercise in favor of another,' and that the joint resolution, passed contemporaneously with the approval of the Act, was 'intended for

the benefit of his heirs exclusively, to enable them to take the inheritance after his death.' As to him the forfeiture was complete and absolute, but the ownership after his death was in nowise affected *except by placing it beyond his control while living.*"

"This case has been followed many times since, and it must now be considered as the settled rule of decision in this Court.

"Wade, by the purchase of his own interest in the property, took the property to hold during his life, the same as any other purchaser. Whatever right could be acquired by the purchase, he got and no more. Another could not have purchased, have sold and conveyed the interest of the heirs in the property. Neither can he.

"By the condemnation and sale, *Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped by his warranty from asserting their title.*"

In Avegno vs. Schmidt, which involved the question as to whether the defendant held the property under a confiscation sale, or whether he held it under the foreclosure of a mortgage, existing at the time of the confiscation, which contained the pact *de non alienando*, the Court restates and reaffirms the doctrine declared in Wallach vs. Van Riswick; Pike vs. Wassell, and French vs. Wade.

The Court said (page 298): "Assuming that the decree of condemnation made by the District Court was valid, its effect was to vest in the United States

an estate in the property condemned, for the life of Avegno, *and it left in Avegno no estate or interest of any description which he could convey by deed, or devise by will; but the ownership after his death was in nowise affected except by placing it beyond his control while living.* Wallach vs. Van Riswick, 92 U. S. 202; Pike vs. Wassell, 94 U. S. 711; and French vs. Wade, 102 U. S. 132. The cases cited, also declared that the joint resolution, passed contemporaneously with the Act of July 17th, 1862, was intended for the benefit of the heirs of the person whose property was condemned to enable them to take the inheritance after his death."

The Court, however, held that the virtue of the pact *de non alienando*, contained in the mortgage, was such as to give the holder of the mortgage a right to proceed to foreclose it by making Avegno alone a party defendant, and that the proceedings against Avegno by virtue of said pact divested the fee-simple title of his heirs, not because the fee was in Avegno after the confiscation, but because there was such a privity between Avegno and his heirs, that the latter were bound by a suit and decree to enforce a mortgage executed by their ancestor containing the pact *de non alienando*, to which the ancestor alone had been made a party defendant (p. 300).

Shields vs. Shiff was a case almost identical with that of Avegno vs. Schmidt, and all that the Court held in that case was, that the heirs of Surjet, taking from their ancestor by inheritance, was bound by the

pact *de non alienando*, contained in the mortgage upon the confiscated property, and were bound by proceedings taken in accordance with the pact *de non alienando* to foreclose the mortgage.

There is a labored attempt made in the brief to establish a discrepancy between the doctrine of Avegno vs. Schmidt and Shields vs. Shiff, and the doctrine of Wallach vs. Van Riswick; Pike vs. Wassell and French vs. Wade, and to draw a distinction between these latter cases and the case at bar.

It is insisted that this Court in Avegno vs. Schmidt has held that the confiscation proceedings left the fee of the property in the confiscatee, or retained it in the United States; consequently, that the pardon of the offender restored him the fee if it remained in him after the confiscation proceeding, or restored it to him if it remained in the United States.

A mere inspection of these two opinions shows that this claim is unfounded.

If this Court has decided anything without variance, it has decided that the confiscation proceedings absolutely divested every right, title and interest which the confiscatee had in the property; that it entirely separated his estate from that of his heirs, and that it entirely paralyzed his power over the property during his life, either to affect it by deed or to devise it by will.

In all of those cases the Court has refused, and found it unnecessary, to decide where the fee was after the confiscation.

The common law doctrine that the fee cannot be in abeyance, it has positively declared not applicable to the case and not material to determine, and that whatever may have been the common law doctrine, that doctrine must yield to the statute.

In answer to the suggested difficulty that if the ancestor was not seized of the property at his death, the heir could not take it, the Court has declared that it was not necessary either at common law, or under this statute, that the ancestor should be seized in order that the heir might take by inheritance.

In answer to the plea that the pardon and the amnesty proclamation had restored to the confiscatee the power to dispose of the property and to bind his heirs by warranty deeds, the Court has declared, from the above principles, that the pardon could not give back the property which had been sold, nor any interest in it either in possession or expectancy.

Nobody, but the learned counsel for the plaintiffs in error, can discover any contrariety whatever between these opinions, or any difference between those cases, and the case at bar.

In the opinion, in Avegno vs. Schmidt, the Court goes back to and quotes from the opinion in Wallach vs. Van Riswick, to demonstrate that they held in that case, that the heirs took the confiscated property by descent (113 U. S., pp. 300, 301). This being so, how can there be any conflict between the two cases, or any new doctrine declared in the latter inasmuch as it is expressly made to base itself on the former?

In the same case in the Supreme Court of Louisiana, that Court held that, under the Confiscation Act, the the fee vested in the presumptive Heirs of Avegno, (35 Annual, p. 589), and finally (pages 590 and 591), that it made no difference for the purposes of the case where the fee was vested.

In Shields vs. Shiff, (36 An. 644), all of the Judges agreed on the single point that, wherever the fee was, it was divested by the proceedings under the mortgage containing the pact *de non alienando;* and this opinion was all that this Court affirmed (124 U. S. p. 356). The controversy between the Judges of the State Court as to where the fee dwelt, this Court was careful to take no part in and careful not to indicate its own opinion. That the conclusion of this question was unnecessary for the case, was sufficient to steer this Court out of its path.

If, therefore, the seizure, condemnation and sale of Bosworth's estate in the lots in controversy "left in him no estate or interest or any description which he could convey by deed, and no power which he could exercise in favor of another" (92 U. S., 208; 94 U. S., 712; 102 U. S., 134; 118 U. S., 298): if the joint resolution passed contemporaneously with the approval of the act was "intended for the benefit of his heirs exclusively to enable them to take the inheritance after his death" (92 U. S., 213; 94 U. S., 712; 102 U. S., 134; if "as to him the forfeiture was complete and absolute; but the ownership after his death was in nowise affected except by placing it beyond his control

while living" (92 U. S., p. 209; 94 U. S., p. 712; 102 U. S., 134; 118 U. S., 298); if " by the condemnation and sale his estate was separated entirely from that of his heirs, after his death, and his heirs are not estopped by his warranty from asserting his title" (102 U. S. 134; 92 U. S. 214); if "proceedings under the Confiscation Act are justified as an exercise of belligerent rights against a public enemy and are not in their nature a punishment for treason" (91 U. S. pp. 26-27), what possible rights in the confiscated property, either "in possession or in expectancy" (92 U. S. 214; 91 U. S. 21), can a pardon for treason give to the former owner?

The whole argument on the other side may be summed up in the statement that the pardon for treason restored the fee, or the right to control the fee, in property seized, condemned and sold as enemy property under the laws of war. This is the very proposition which the Court, for the reasons above given, has denied both in the Wallach and in the Semmes cases.

There is no argument or suggestion in the plaintiffs' brief as to how the pardon of the claimants' ancestor for his offenses against the government could deprive his heirs of the benefit secured solely to them by the joint resolution of Congress. The confiscation was an accomplished fact, and whatever rights grew out of that fact were already vested when the pardon was granted.

There would be as much reason to hold that the

pardon divested the title of the purchaser of the estate for the life of the public enemy, who was also a public offender, as to hold that it annulled the effect of the joint resolution and divested the rights thereby secured ultimately to the heirs on the death of their ancestor.

He was entirely disseized by the confiscation of the whole estate, and they were authorized to take this whole estate, at his death, as his heirs, by descent, although there was no seizin in him at the time of his death. The pardon may have made him a "new man," but it did not make new facts or destroy vested rights. Knote vs. U. S., 95 U. S. p. 153; Osborn vs. U. S., 91 U. S. p. 474.

We ask for an affirmance of the judgment.

Respectfully submitted,

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